

OUTLINE

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

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UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT (USFSPA)

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UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

Outline of Instruction

I. INTRODUCTION.

A. What the USFSPA Does:

1. Allows states to treat disposable military retired pay as marital property or community property.
2. Allows former spouses in some cases to receive their share of military retired pay directly from military finance centers.
3. Allows some former spouses to continue to receive military benefits (commissary and PX/BX privileges as well as health care).
4. Allows former spouses to be designated as SBP beneficiaries.

B. What the USFSPA Does Not Do:

1. Does not require courts to divide military retired pay.
2. Does not establish a formula or award a predetermined share of military retired pay to former spouses.
3. Does not require an overlap of military service and marriage as a prerequisite to division of military retired pay as property.

II. HISTORY.

A. McCarty v. McCarty, 453 U.S. 210 (1981) (states are preempted from dividing nondisability military retired pay).

B. Congress Acts--the Uniformed Services Former Spouses' Protection Act, Pub. L. 97-252, 96 Stat. 730 (1982), as amended, and codified at 10 U.S.C. §§ 1072, 1076, 1086, 1408, 1447, 1448, 1450, & 1451; see 32 C.F.R. Part 63 (rules regarding direct payment from military finance centers).

1. The USFSPA overrules McCarty by providing that state courts may treat disposable retired pay as marital property. 10 U.S.C. § 1408(c)(1).

2. It provides that in certain cases the former spouse may receive his/her share of retirement pay directly from the military services. 10 U.S.C. § 1408(d).
3. It provides that some former spouses will be entitled to health care and access to commissaries and PX's.
4. It also provides that former spouses may be designated as beneficiaries of the Survivors Benefit Plan.
5. Effective date: 1 Feb 83.

C. Mansell v. Mansell, 490 U.S. 581 (1989).

1. What pay is divisible--gross retired pay or "disposable retired pay?"
 - a) Significance :

[In the following table, assume retired pay is divided equally by the court and that neither party has any other income or are claiming any withholding exemptions]

	<u>Retiree</u>	<u>Spouse</u>
Gross retired pay	\$ 2,000	
VA Disability pay	\$361	
Waived retired pay	(\$361)	
Disposable retired pay	\$1,638	
Division of D R P	\$819	\$819
Tax (15% rate)	(\$123)	(\$ 123)
Net after taxes	\$ 1,057	\$696

- b) The arguments:

- (1) Disposable: McCarty said courts cannot divide military retired pay, but the USFSPA then said states could divide

"disposable retired pay" (DRP); thus, there is no authority to divide anything except the DRP amount.

- (2) Gross: notwithstanding the language about DRP, Congress intended to fully overrule McCarty, and thus states are free to do as they please.

- c) The result--several jurisdictions developed case law upholding authority to divide gross pay.

2. Facts of Mansell.

- a) 10 U.S.C. § 1408(c)(1) provides that "a court may treat disposable retired...pay...either as property solely of the member or as property of the member and his spouse...."
- b) Retired soldiers who are moderately disabled can receive disability benefits from the Veterans Administration; in order to receive these VA benefits, however, they must first waive an equivalent amount of military retired pay.
 - (1) These VA benefits are not taxable.
 - (2) The VA benefits are not retired pay or "disposable retired pay."
 - (3) The money waived to receive the VA benefits is excluded from the term "disposable retired pay."
- c) Major Mansell divorced his wife, and the court awarded her a share of his military retired pay.
- d) When MAJ Mansell retired, he elected to receive VA disability pay, and therefore he waived a portion of his military retired pay.

3. Issue: do state courts have authority to award the spouse a share of the value of such waived military retired pay?

4. Holding: the language of 10 U.S.C. § 1408(c)(1) preempts states from dividing the value of the waived military retired pay because it is not "disposable retired pay."

5. Dissent.

- a) This is unfair to former spouses because it allows members unilaterally to shift money from the spouse to the member.

- b) This is too narrow a view of the USFSPA; it was intended to completely overrule McCarty and restore to states full authority to divide military benefits in any manner they felt appropriate.

III. DIVISIBILITY OF RETIRED PAY.

A. Key Statutory Provisions:

1. USFSPA, 10 U.S.C. § 1408(c)(1): "... a court may treat disposable retired pay . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."
2. USFSPA, 10 U.S.C. § 1408(a)(4):

"Disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which-

(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

(C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed under the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(D) are deducted because of an election under chapter 73 of this title [10 U.S.C.S. § 1431 et seq.] to provide an annuity to a spouse of former spouse to whom a payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

B. Only "disposable retired pay is divisible."

1. The Mansell decision addresses this issue.

"...[U]nder the Act's plain and precise language [i.e., 10 U.S.C. § 1408(c)(1)], state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted authority to treat total retired pay as marital property." Mansell, 490 U.S. at 587.

2. Also note possible state statutory limitations.
 - a) Indiana defines marital property as including "disposable military retired pay."
 - b) Virginia statute says pensions are divisible, but that the spouse can be awarded only 50% of the actual cash benefits received by the retiree.
3. North Carolina has ruled that courts can divide gross pay, up to a maximum of one-half the disposable pay; this limitation arises from state law.

C. Specific courts are empowered to order a division of retired pay.

1. A court of competent jurisdiction of any state, DC, PR, Guam, Am. Samoa, the Virgin I., N. Mariana I., & the Trust Terr. of the Pacific.
2. Any federal court of competent jurisdiction.
3. Any foreign court of competent jurisdiction IF there is a treaty requiring the U.S. to honor court orders of such nation.

--But no such treaty is in force regarding court orders of any nation.

D. The USFSPA establishes jurisdictional requirements for division of military retired pay as property.

1. If retired pay is to be divided as a matter of property settlement, jurisdiction is limited to jurisdiction based on one of the following:
 - a) Domicile in the territorial jurisdiction of the court, or
 - b) Residence within the state other than because of military assignment, or
 - c) Consent to jurisdiction.
 - (1) A general appearance constitutes "consent"; the member need not specifically consent to jurisdiction to divide the pension. See, e.g., Kildea v. Kildea, 420 N.W.2d 391 (Wis. Ct. App. 1988).
 - (2) Continuing jurisdiction may also constitute "consent."

- (a) Bumgardner v. Bumgardner, 421 So.2d 668 (La. Ct. App. 1988) (court retained continuing jurisdiction to partition military retired pay after the divorce).
- (b) McDonough v. McDonough, 184 Cal. App. 3d 45, 227 Cal. Rptr. 872 (1986) (the court found that it had continuing jurisdiction to partition military retired pay).
- (c) But note Tarvin v. Tarvin, 187 Cal. App. 3d 56, 232 Cal. Rptr. 13 (1986) (no continuing jurisdiction over a nondomiciliary, nonresident retiree to partition military retired pay after the decree is final).

- 2. NOTE - There is no USFSPA limitation on a court's jurisdiction in awarding a portion of retired pay for child support or alimony purposes.

E. Subject to Limitations in the USFSPA, State Law Controls.

- 1. No federal right to a portion of retired pay is created; within broad limitations set by the USFSPA, state law controls whether and how much to divide military retired pay for the following purposes:
 - a) Division to enforce child support obligations.
 - b) Division to enforce alimony obligations.
 - c) Division for property settlement purposes.
- 2. With the release of significant decisions from the Alabama and Mississippi Supreme Courts in 1993 and 1994 (see attached state by state analysis of the divisibility of military retired pay), almost every state has now clearly ruled that military retired pay is divisible for property settlement purposes (as well as alimony and child support in appropriate cases). The primary exception to the rule is Puerto Rico, although several states, notably North Carolina, Indiana and Arkansas, continue to interpose a vesting requirement..
- 3. "Typical" formula for dividing retired pay is a creation of state law - there is no formula provided in federal law!!!.

$$\frac{1}{2} \times \frac{\text{Length of time the marriage overlaps with military service}}{\text{Length of military service}} \times 100 = \text{Spouse's \%}$$

4. Some states have "vesting" requirements.
 - a) In some states vesting is a prerequisite to division and vesting can occur at different points in the military career (e.g., 18 or 20 years).
 - b) The majority of the states will generally divide vested or nonvested pensions. Several states require vesting in some form as a prerequisite to division (e.g., Arkansas, Indiana and North Carolina).

IV. MAJOR PRACTICE ISSUES.

A. Is military disability retired pay divisible?

1. Old law: neither McCarty nor the USFSPA addressed the issue of military disability retired pay, and states split on the issue whether they have authority to divide it.
2. Although Mansell appeared to have resolve the question in the negative, the USFSPA was amended to include a limited portion of disability retired pay within the definition of "disposable retired pay." 10 U.S.C. § 1408(a)(4).
 - a) Now, a portion of disability retired pay is divisible in some cases (i.e., where the disability retired pay multiplier is a reflection of longevity and not disability).
 - b) A few states never divide disability pay as marital property. The rest must decide whether they are limited in their power to do so by the change in the USFSPA.

B. What is the appropriate formula to be applied?

Variations on the standard formula:

1.

$$\frac{\text{Length of time the marriage} \\ 1/2 \times \text{overlaps with military service}}{\text{Length of military service at} \\ \text{separation or divorce}} \times 100 = \text{spouse's \%}$$

2.

$$\frac{\text{Spouse's \% using standard formula} \times \text{retired pay for rank held} \\ \text{at time separation\divorce}}{\text{Actual Retired Pay}} = \%$$

C. Why not a lump sum?

1. Pro: not necessarily reduced by waiver or offset of retired pay.
2. Con: Loss of COLA's.

D. Is conduct of the military spouse relevant to the question of how much of the military pension should be awarded to the former spouse?

1. Community property jurisdictions.
2. Equitable distribution states.

E. What about direct payment to the former spouse?

1. For all direct payment orders, there must be:
 - a) A final decree of divorce, dissolution, legal separation, or court approval of a property settlement agreement.
 - b) A statement in the order that the soldier's Soldiers' and Sailors' Civil Relief Act rights were observed (if he or she was not represented in court).
2. The maximum amount of money directly payable to the former spouse is 50% of the retiree's disposable retired pay. This is a limit on how much retired pay must be paid to satisfy judgments awarding a share of military retired pay as property. Single or multiple judgments awarding military

- retired pay as property are considered to be fully satisfied by payments that total 50% of "disposable retired pay."
- 3. For direct payment of retired pay awarded as property, the following additional requirements apply.
 - a) A "10 year" test has to be met; there must be at least 10 years of marriage which overlap with 10 years of service creditable toward retirement.
 - b) The court order must provide for payment from military retired pay, and the amount must be a specific dollar figure or a specific percentage of disposable retired pay.
 - c) The order must show that the court has jurisdiction over the soldier in accordance with USFSPA provisions.
- 4. NOTE - There are no special requirements for a former spouse to receive direct payment of child support and alimony awards.
- F. Should we calculate a present value of the pension and attempt to offset its value with other assets?
 - 1. Calculation - discount rate, valuation date, life expectancy.
 - 2. Offset - are there assets available?
- G. What happens if waiver of retired pay reduces the former spouses share of disposable retired pay?
 - 1. The DFAS Perspective - pay the reduced amount.
 - 2. Equity - a potential remedy that may permit the matter to be reopened. A petitioning former spouse might argue that waiver is contrary to the parties' intent and violative of the court's order. A responding retired member might take the position that waiver was foreseeable.
 - 3. Preventive Measures:
 - a) Express promises not to take action that affects disposable retired pay.
 - b) Consent to continuing jurisdiction or reopening the issue of property division in the event of a change.

H. Division of Reserve Component retired pay.

1. A question of points versus years.
2. DFAS reviews a formula approach based on points in its proposed rule - revision to permit use of points or years in formula formats is an alternative RC members should examine.

I. Dividing military retired pay - property division vs. alimony..

1. Division as marital or community property.

- a) The concept is that the former spouse has earned an independent right to a share of the retired pay by participating in the economic partnership that accrued the right to receive the money.
- b) Spouse's share is usually a fixed amount or a fixed percentage that terminates only upon the death of either party; it is not modifiable or terminable.
- c) Spouse's share may or may not be taxable to the spouse.
- d) Usually considered the best arrangement for the former spouse, BUT, spouses share may be lost if servicemember is disability retired or receives VA disability payments and accrued arrearages may be dischargeable in bankruptcy.

2. Division as alimony.

- a) The amount of alimony is based on the recipient spouse's need, balanced against the payor's ability to pay; the former spouse receives no "right" to a portion of retired pay. The amount could be more or less than any "property right" that has accrued.
- b) Permanent periodic alimony is modifiable in most states, based on changes in financial circumstances. By court order, it could be increased, decreased, or stopped.
- c) Most states hold that the spouse's remarriage terminates the alimony obligation, and cohabiting arrangements may have the same effect, especially when the live-in partner shoulders part of the support burden.
- d) Unless the parties agree otherwise, alimony almost always results in taxable income for the recipient and an income adjustment for the payor.

- e) Alimony obligations cannot be discharged in bankruptcy proceedings.
- 3. Most separation agreements treat retired pay as marital or community property. Key factors to weigh in making such a decision include--
 - a) Alimony payments begin immediately, while property divisions usually do not occur until the member retires.
 - b) A property division may create an incentive for the member to leave active duty; perhaps alimony until the time of retirement, followed by a property division, makes more sense.
 - c) The divorce court's jurisdiction to divide retired pay as property.
 - d) The likelihood of arrearages and the possibility that the retiree may declare bankruptcy.
 - e) The retiree's financial prospects and the possibility that the former spouse will have greater need later.
 - f) The former spouse's prospects for remarriage.
 - g) Courts can divide retired pay as marital property and award the spouse alimony; these situations raise the issue of "double dipping."

J. Tax Treatment of Divisions.

- 1. As a result of the FY 91 DOD Authorization Act amendments to the USFSPA, amounts paid directly to a former spouse by a military finance center will not be treated as retired pay earned by the retiree by the military services. Direct payments of retired pay received from finance by the former spouse are now subject to withholding.
- 2. Withholding - The finance center will withhold taxes on amounts paid directly to ex-spouses. Separate W-2 forms are issued to the retiree and the former spouse.

K. USFSPA and SEPARATION INCENTIVES

1. In addition to involuntary separation benefits and voluntary 15 year retirement, some soldiers are being offered annual payments (voluntary separation incentive or VSI) or a lump sum (special separation benefit or SSB) if they elect to leave active duty voluntarily. Are these payments divisible as marital property?
2. Clearly they are not "disposable retired pay" and therefore do not fall under the USFSPA.
 - a) Does McCarty control?
 - b) What was Congressional intent?

VSI payments are non-transferable, but can be inherited. 10 U.S.C. § 1175(F).
3. Results in state courts are mixed; particularly in cases where the member is not yet retirement eligible, this issue needs to be anticipated and addressed - see Navy OJAG review titled, "Divisibility of SSB and VSI in Divorce Cases"

L. Specific Practice Problems.

1. Failure to mention retired pay can mean waiver!
2. Filing in the wrong state (i.e., one without jurisdiction to divide military retired pay as property). If this happens, consider refiling or petitioning the court for alimony.
3. Overseas concerns - at this time there are no foreign courts that have the authority to divide military retired pay as property! Consider bringing the entire action back to the United States.

V. ADDITIONAL BENEFITS FOR QUALIFYING FORMER SPOUSES.

A. Commissary and PX/BX.

1. USFSPA § 1005 (96 Stat. 737): "...an unremarried former spouse...is entitled to commissary and post exchange privileges to the same extent and on the same basis as the surviving spouse of a retired member of the uniformed services."
2. Requirements to qualify.

- a) Unremarried has been read to mean "unmarried" for these benefits; termination of a subsequent marriage does revive them.
- b) 20/20/20 test.
 - (1) 20 years of creditable service by the member, and
 - (2) 20 years of marriage, and
 - (3) 20 years of overlap between marriage and the creditable service.
- c) The date of the divorce is now irrelevant (originally, the divorce had to be dated after the effective date of the USFSPA, but this limitation has been deleted by § 645(b), Pub. L. 98-525, 98 Stat. 2547).

B. Medical Benefits.

- 1. Cite: USFSPA § 1004, 96 Stat. 737, codified at 10 U.S.C. §§ 1072(2), 1076(b) & 1086(c).
- 2. Three categories of health care.
 - a) Full military health care program, including CHAMPUS coverage (up to age 62) and in-patient and out-patient care at military treatment facilities.
 - b) Transitional health care: full coverage for one year after the divorce, with the possibility of limited coverage for an additional year.
 - c) The DOD Continued Health Care Benefit Program (CHCBP) insurance plan that has been negotiated by DOD.
- 3. Requirements to qualify for full military health care program.
 - a) Unremarried; termination of a subsequent marriage by divorce or death of the second spouse does not revive health care benefits, but an annulment does.
 - b) 20/20/20 test (or, 20/20/15 test and divorce dated before 1 April 1985).
 - c) Not enrolled in an employer-sponsored health insurance plan.
 - d) As in the case of commissary and PX benefits, the date of the divorce is now irrelevant.

4. Requirements for transitional health care.

- a) Unremarried; termination of a subsequent marriage by divorce or death of the second spouse does not revive health care benefits, but an annulment does.
- b) 20/20/15 test.
 - (1) 20 years of creditable service by the member, and
 - (2) 20 years of marriage, and
 - (3) 15 years of overlap between marriage and the creditable service.
- c) Not enrolled in an employer-sponsored health insurance plan.
- d) To qualify for the second year of limited coverage, the spouse must have enrolled in the DOD Continued Health Care Benefit Program (CHCBP).

5. DOD Continued Health Care Benefit Program (CHCBP).

- a) Eligibility: anyone who loses entitlement to military health care (e.g., former spouses, non-career soldiers and their family members, etc.).
- b) Concept: premium based temporary health care coverage program designed to mirror the benefits offered under the basic CHAMPUS program (it is not, however, part of CHAMPUS).
 - (1) Facilitates retention of medical insurance coverage until alternative coverage can be obtained (former members qualify for up to 18 months, former spouses and others who no longer qualify as dependents qualify for 36 months coverage).
 - (2) Primary advantage: guaranteed eligibility for most people if they enroll within 60 days of losing CHAMPUS benefits.
 - (3) Not free to the individual - premiums must be paid three months in advance; rates are set for two rate groups, individual and group, by the Assistant Secretary of Defense (Health Affairs).

C. Survivors' Benefit Plan.

1. Original USFSPA provisions.

- a) Member could designate a former spouse as an SBP beneficiary, but only on the basis of a person with an insurable interest. USFSPA § 1003, 96 Stat. 735.
- b) The designation had to be voluntary: "Nothing in this chapter [USFSPA] authorizes any court to order any person to elect under [10 U.S.C. § 1448(b)]...to provide an annuity to a former spouse unless such person has voluntarily agreed in writing to make such an election." USFSPA § 1003.

2. Amendments to the original provisions.

- a) Now a former spouse can be designated an SBP beneficiary in the same category that applies to current spouses, so the "natural person with an insurable interest" offset does not apply.
- b) Additionally, a court can now order a retiring soldier to designate the former spouse as an SBP beneficiary--the election need not be voluntary.
 - (1) This "deemed" election is not automatic; it must be triggered by a request from the former spouse, and the request must be sent to the appropriate military finance center not later than 1 year after the date of the court order. 10 U.S.C. § 1450(f)(3)(A).
 - (2) Once a timely request is made, the finance center will flag the service member's records. Upon the member's retirement, the former spouse will be designated as an SBP beneficiary.

VI. CONCLUSIONS.

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APPENDIX A

Uniformed Services Former Spouses' Protection Act¹	Length of Time that Marriage Overlaps with Service Creditable for Retirement Purposes³			
	Number of Years			
Benefits for Former Spouses²	0 to <10	10 to <15	15 to <20	20 or more
Division of Retired Pay ⁴	X	X	X	X
Designation as an SBP Beneficiary ⁵	X	X	X	X
Direct Payment ⁶				
Child Support	X	X	X	X
Alimony	X	X	X	X
Property Division ⁷		X	X	X
Health Care ⁸				
Transitional ⁹			X	
Full ¹⁰				X
Insurance ¹¹	X	X	X	X
Commissary ¹²				X
PX ¹²				X
Dependent Abuse				
Retired Pay Property Share Equivalent ¹³		X	X	X
Transitional Compensation ¹⁴	X	X	X	X

FOOTNOTES

¹ Pub. L. 97-252, Title X, 96 Stat. 730 (1982), as amended. This chart reflects all changes to the Act through the amendments in the National Defense Authorization Act, Fiscal Year 1994, Pub. L. 103-160 (1993).

² For guidance on obtaining a military identification card to establish entitlement for health care, commissary, and PX benefits, see appropriate service regulations (e.g., AR 640-3). Former spouses of reserve component members may be entitled to these benefits; see the following notes for applicable benefits.

³ Except for Dependent Abuse Victims Transitional Compensation payments, this chart assumes that the member serves long enough to retire from an active duty component or reserve component of the Armed Forces (generally this will mean (s)he has twenty years of service creditable for retirement purposes, but can mean fifteen years in the case of the Voluntary Early Release and Retirement Program [statutory authority for this program expires in 1999]).

⁴ At least one court has awarded a portion of military retired pay to a spouse whom the retiree married after he retired, Konzen v. Konzen, 103 Wash.2d 470, 693 P.2d 97, cert denied, 473 U.S. 906 (1985).

⁵ Federal law does not create any minimum length of overlap for this benefit; the parties' agreement or state law will control a former spouse's entitlement to designation as an SBP beneficiary.

⁶ See 10 U.S.C. §§ 1408(d) & 1408(e) and 32 C.F.R. part 63 for further guidance on mandatory language in the divorce decree or court-approved separation agreement. The former spouse initiates the direct payment process by sending a written request to the appropriate finance center.

⁷ While eligibility for direct payment does not extend to former spouses whose overlap of marriage and service is less than ten years, this is not a prerequisite to award of a share of retired pay as property to the former spouse (see Note 4).

⁸ To qualify for any health care provided or paid for by the military, the former spouse must be unremarried and must not be covered by an employer-sponsored health care plan; see 10 U.S.C. §§ 1072(2)(F), 1072(2)(G) & 1072(2)(H). Department of the Army interpretation of this provision holds that termination of a subsequent marriage by divorce or death does not revive this benefit, but an annulment does. These remarriage and employer-insurance restrictions do not limit eligibility to enroll in the civilian health care insurance plan discussed in Note 11.

⁹. "Transitional health care" was created by Pub. L. 98-625, § 645(c) (not codified), as a stop-gap measure while a civilian health care plan was negotiated for former spouses and other who lose an entitlement to receive military health care (see Note 11). The program subsequently was modified and narrowed by the National Defense Authorization Act, Fiscal Year 1989, Pub. L. 100-456, Title VI, § 651, 102 Stat. 1990 (1988). Current program benefits are described at 10 U.S.C. § 1078a, titled "Continued Health Benefits Coverage." Qualifying former spouses are those who are unremarried, who have no employer-sponsored health insurance, and who meet the "20/20/15" requirement (i.e., married to the member for at least 20 years, and the member has at least 20 years of service that are creditable for retirement purposes, and the marriage overlaps at least 15 years of the creditable service). Transitional health care now includes full military health care for 1 year after the date of the divorce, and during this period the former spouse is eligible to enroll in the civilian group health care plan negotiated by DOD (see Note 11).

Note that for health care purposes, 10 U.S.C. § 1072(2)(G) treats a 20/20/15 former spouse as if he or she were a full 20/20/20 former spouse (20 years of marriage, 20 years of service, and 20 years of overlap) if the divorce decree is dated before April 1, 1995. A 20/20/15 former spouse of a reserve component retiree with a divorce decree prior to April 1, 1985, can receive full health care too, but only if the member survives to age 60 or if he or she elected to participate in the Reserve Component Survivor Benefit Program upon becoming retirement eligible.

¹⁰. "Full health care" includes health care at military treatment facilities and that provided through the CHAMPUS insurance program. A former spouse of a reserve component retiree is eligible for this benefit upon the retiree's 60th birthday (or on the day the retiree would have been 60 if (s)he dies before reaching age 60) if (s)he meets the normal qualification rules (i.e., an unremarried 20/20/20 former spouse who is not covered by an employer-sponsored health care plan); see 10 U.S.C. § 1076(b)(2).

¹¹. Implementation of the Department of Defense Continued Health Care Benefit Program (CHCBP) was directed by Congress in the National Defense Authorization Act for Fiscal Year 1993 (see 10 U.S.C. § 1078a). It is a premium based program of temporary continued health benefits coverage available to eligible beneficiaries. Medical benefits mirror those available under the basic CHAMPUS program, but CHCBP is not part of CHAMPUS. For further information on this program, contact a military medical treatment facility health benefits advisor, or contact the CHCBP Administrator, P.O. Box 1608, Rockville, MD 20849-1608 (1-800-809-6119). The CHCBP replaces the Uniformed Services Voluntary Insurance Program (USVIP).

¹² Pursuant to statute and service regulations, commissary and PX benefits are to be available to a former spouse "to the same extent and on the same basis as the surviving spouse of a retired member..." Pub. L. 97-252, Title X, § 1005, 96 Stat. 737 (1982); see Army Regulation 640-3. The date of the divorce is no longer relevant for commissary and PX purposes. See Pub. L. 98-525, Title IV, § 645, 98 Stat. 2549 (1984) (amending Uniformed Services Former Spouses' Protection Act § 1006(d)). The former spouse must be "unmarried," and, unlike the rules for health care, any termination of a subsequent marriage revives these benefits. Qualified former spouses of reserve component retirees receive commissary and PX benefits when the retiree reaches age 60 (or when (s)he would have reached age 60 if the retiree dies before that time, but in such cases the entitlement arises only if the retiree elected to participate in the Reserve Component Survivor Benefit Plan when (s)he became retirement eligible; see AR 640-3). Notwithstanding the provision of the Act and the regulation, however, the extent of commissary and exchange privileges in overseas locations may be restricted by host-nation customs law.

¹³ When a retirement-eligible member receives a punitive discharge via court-martial, or is discharged via administrative separation processing, the member's retirement benefits are lost. In certain cases where the court-martial or separation action was based on dependent abuse, eligible spouses may receive their court-ordered share of retired pay (divided as property) as if the member had actually retired. Authority for these payments was created in the National Defense Authorization Act, Fiscal Year 1993, § 653, Pub. L. 103-484. An overlap of marriage and service of at least ten years is a prerequisite to receipt of payments. The National Defense Authorization Act, Fiscal Year 1994, § 555, Pub. L. 103-160, clarifies that eligibility begins on the date the sentence is approved and does not have to wait until the member is actually discharged.

¹⁴ The National Defense Authorization Act, Fiscal Year 1994, § 554, Pub. L. 103-160, also creates authority for monthly transitional compensation to dependents of a non-retirement eligible member separated from the service by reason of dependent abuse.

APPENDIX B

State-by-State Guide to Divisibility of Military Retired Pay

Former Spouses' Protection Act Update

Almost all judge advocates, no matter where they work, will at some point be asked about the Uniformed Services Former Spouses' Protection Act (USFSPA).¹ Enacted in 1983, the Act continues to be a source of discussion, litigation, and even amendment to this day. Why such heightened interest? And why, given the Act's age, isn't the area more settled?

Part of the heightened interest in the USFSPA is undoubtedly attributable to the emotional attachment military members have for military retired pay. Many link retired pay to difficult duty experiences, sometimes served in combat zones. Despite an emotional attachment, most military members understand that the USFSPA authorized states to divide military retired pay as property.² Almost as many realize that in most of the United States, military retired pay has been divided as marital or community property.³ As a result, the critical point of significance today is probably value.

Military retired pay is frequently the most significant asset acquired during a military member's marriage. This should not be a surprise - military pensions

¹Pub. L. No. 97-252, 96 Stat. 730 (1982)(codified as amended at 10 U.S.C. §§ 1072, 1076, 1086, 1408, 1447, 1448, 1450, 1451 (1994)).

²*Id.* at §1408(c).

³The primary exception is now Puerto Rico. See the State-by-State Guide that follows.

often have much greater value than nonmilitary pension interests. This stems from the point in life at which payments begin; for those leaving active duty, retired pay begins immediately. It is not unusual for members to retire from the military at age forty, or even earlier. Compare this with nonmilitary pension interests which may not begin paying out until age fifty-five or sixty.⁴

How much and when retired pay will be paid are questions of federal law. Subject to some limitations, the question of how much retired pay is marital property and how it will be divided at divorce are questions of state law. As a result, legal assistance attorneys (LAAs) must not only fully understand the federal law, but must be capable of addressing nuances in the law of our more than fifty states and territories. Failing to appreciate these differences in state law, even if the same asset is being addressed, can affect property interests to the tune of hundreds of thousands of dollars. Fortunately, in addition to direct research in the cases and statutes of each of these forums, there are resources available to make this job easier.

A resource LAAs should keep at hand is the TJAGSA Practice Notes section of The Army Lawyer. Although notes cover a full range of legal

⁴Active component military retirement pay can have a present value of tens of thousands of dollars, several hundred thousand dollars, on up to a million dollars. Present value determinations are dependent on rank, years of service at time of retirement, life expectancy, and discount rate used. Estimates of present value can be obtained using the LAAWS Separation Agreements program pension value calculator. Counsel with clients who want/need an accurate valuation for purposes of trading part or all of their pension should consider using the services of a pension valuation expert. Firms specializing in this work regularly advertise in bar journals.

assistance topics, the USFSPA has been the specific focus of notes on a regular basis. The discussion of formula clauses in the June 1995 issue is a significant example.⁵ Other recent notes have discussed the status of retired pay as property,⁶ the impact of VA disability pay on retired pay,⁷ the Survivor Benefit Plan (SBP),⁸ and the impact of the Dual Compensation Act on retired pay.⁹ In addition to The Army Lawyer, the USFSPA is the subject of training at TJAGSA's biannual legal assistance courses. For those unable to attend this training, or for a refresher, a videotape of this instruction can be obtained from TJAGSA's Video Information Library.¹⁰ The outline and handouts for this instruction, and additional reference materials of interest, are available in TJAGSA's Legal Assistance Branch publication, JA 274, A Guide to the Uniformed Services Former Spouses'

⁵See *TJAGSA Practice Notes, Legal Assistance Items, USFSPA Update - Using Formula Clauses to Define the Former Spouse's Share of Disposable Retired Pay*, ARMY LAW., Jun. 1995, at 53.

⁶ARMY LAW., Sep. 1995, at 28.

⁷ARMY LAW., Oct. 1995, at 28.

⁸ARMY LAW.. Dec. 1995, at 71.

⁹ARMY LAW., Mar. 1996, at 133.

¹⁰Interested personnel should consult the current Videotape Bulletin of The Judge Advocate General's School for information on how to get tape copies, or contact the School's Visual Information Branch at (804) 972-6317. The videotape referenced is #96-0033A, "Uniformed Services Former Spouses' Protection Act," Parts I, II (Block, Feb 96).

Protection Act.¹¹ Finally, given the significance of state law in division of military retired pay, LAAs will find the updated state-by-state analysis of the divisibility of military retired pay that follows an invaluable reference.¹² Major Block.

¹¹This publication is new in June 1996, and is available in electronic format through the LAAWS Bulletin Board Service (BBS). See the back of this issue for information on downloading files from the BBS.

¹²Future updates to this state-by-state analysis will be published electronically to TJAGSA's JA 274; *See note 11*.

*State-by-State Analysis of the Divisibility
Of Military Retired Pay*¹³

On 30 May 1989, the United States Supreme Court announced its decision in Mansell v. Mansell.¹⁴ In Mansell, the Court ruled that states cannot divide the value of Department of Veterans Affairs (VA) disability benefits that are received in lieu of military retired pay.¹⁵ The Court's decision clarifies that states are limited to dividing disposable retired pay, as defined in 10 U.S.C. § 1408(a)(4).¹⁶ When using the following materials, remember that Mansell effectively overrules some of the listed caselaw predating the decision, at least to the extent a case suggests state courts have the authority to divide more than disposable retired pay. Since Mansell, courts have generally recognized the limitations of the disposable retired pay definition found in Title 10. For example, in Torwich v. Torwich, a New Jersey appellate court wrestled with the impact that waiver of military retired

¹³This note updates the Note, "State-by-State Analysis of the Divisibility of Military Retired Pay," ARMY LAW., Jul. 1994, at 41. It was developed with the assistance of military attorneys, active and reserve, and civilian practitioners located throughout the country. In a continuing effort to foster accuracy and timeliness, updates and suggested revisions from all jurisdictions are solicited. Please send your submissions to the Administrative and Civil Law Department, The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, Virginia 22903-1781.

¹⁴490 U.S. 581 (1989).

¹⁵Id. at 594.

¹⁶Id. at 589.

pay associated with receipt of VA benefits has on disposable retired pay.¹⁷ Also, in Knoop v. Knoop,¹⁸ the North Dakota Supreme Court addressed a situation involving the impact of the Dual Compensation Act¹⁹ on disposable retired pay.²⁰

¹⁷660 A.2d 1214 (N.J. Super. 1995). See also TJAGSA Practice Note, *Reductions in Disposable Retired Pay Triggered by Receipt of VA Disability Pay: A Basis for Reopening a Judgment of Divorce*, Army Law., Oct. 1995, at 28.

¹⁸542 N.W.2d 114 (N.D. 1996).

¹⁹5 U.S.C.A. §§ 5531-5404.

²⁰See also, TJAGSA Practice Note, *Reductions in Disposable Retired Pay Triggered by the Dual Compensation Act*, Army Law., Mar. 1996, at 133.

Alabama

Divisible as of August 1993 when the Alabama Supreme Court held that disposable military retirement benefits accumulated during the course of the marriage are divisible as marital property, Vaughn v. Vaughn, 634 So.2d 533 (Ala. 1993). Kabaci v. Kabaci, 373 So. 2d 1144 (Ala. Civ. App. 1979) and cases relying on it that are inconsistent with Vaughn are expressly overruled. Note that Alabama has previously awarded alimony from military retired pay, Underwood v. Underwood, 491 So. 2d 242 (Ala. Civ. App. 1986) (wife awarded alimony from husband's military disability retired pay); Phillips v. Phillips, 489 So. 2d 592 (Ala. Civ. App. 1986) (wife awarded 50% of husband's gross military pay as alimony).

Alaska

Divisible. Chase v. Chase, 662 P.2d 944 (Alaska 1983), overruling Cose v. Cose, 592 P.2d 1230 (Alaska 1979), cert. denied, 453 U.S. 922 (1982). Non-vested retirement benefits are divisible. Lang v. Lang, 741 P.2d 649 (Alaska 1987). Note also Morlan v. Morlan, 720 P.2d 497 (Alaska 1986) (the trial court ordered a civilian employee to retire in order to ensure the spouse received her share of a pension--the pension would be suspended if the employee continued working; on appeal, the court held that the employee should have been given the option of continuing to work and periodically paying the spouse the sums she would have received from the retired pay; in reaching this result, the court cited the California Gillmore decision). Also see Clausen v. Clausen, 831 P.2d 1257 (Alaska 1992) which held that while Mansell precludes division of disability benefits received in lieu of retirement pay, it does not preclude consideration of these payments when making an equitable division of marital assets.

Arizona

Divisible. DeGryse v. DeGryse, 135 Ariz. 335, 661 P.2d 185 (1983); Edsall v. Superior Court of Arizona, 143 Ariz. 240, 693 P.2d 895 (1984); Van Loan v. Van Loan, 116 Ariz. 272, 569 P.2d 214 (1977) (a nonvested military pension is community property). A civilian retirement plan case (Koelsch v. Koelsch, 148 Ariz. 176, 713 P.2d 1234 (1986)) held that if the employee is not eligible to retire at the time of the dissolution, the court must order that the spouse begin receiving the awarded share of retired pay when the employee becomes eligible to retire, whether or not he or she does retire at that point.

Arkansas

Divisible, but watch for vesting requirements. Young v. Young, 288 Ark. 33, 701 S.W.2d 369 (1986); but see Durham v. Durham, 289 Ark. 3, 708 S.W.2d 618 (1986) (military retired pay not divisible where the member had not served 20 years at the time of the divorce, and therefore the military pension had not "vested"). Also see Burns v. Burns, 31 Ark. 61, 847 S.W.2d 23 (1993) (In accord with Durham, but strong dissent favors rejecting 20 years of service as a prerequisite to "vesting" of a military pension).

California

Divisible. In re Fithian, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974); In re Hopkins, 142 Cal. App. 3d 350, 191 Cal. Rptr. 70 (1983). A non-resident servicemember did not waive his right under the USFSPA to object to

California's jurisdiction over his military pension by consenting to the court's jurisdiction over other marital and property issues, Tucker v. Tucker, 226 Cal. App. 3d 1249 (1991) and Hattis v. Hattis, 242 Cal. Rptr. 410 (Ct. App. 1987). Nonvested pensions are divisible; In re Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). In re Mansell, 265 Cal. Rptr. 227 (Cal. App. 1989) (on remand from Mansell v. Mansell, 490 U.S. 581 (1989), the court held that gross retired pay was divisible since it was based on a stipulated property settlement to which res judicata had attached). State law has held that military disability retired pay is divisible to the extent it replaces what the retiree would have received as longevity retired pay (In re Mastropaolo, 166 Cal. App. 3d 953, 213 Cal. Rptr. 26 (1985); In re Mueller, 70 Cal. App. 3d 66, 137 Cal. Rptr. 129 (1977), but the Mansell case raises doubt about the continued validity of this proposition. If the member is not retired at the time of the dissolution, the spouse can elect to begin receiving the award share of "retired pay" when the member becomes eligible to retire, or anytime thereafter, even if the member remains on active duty. In re Luciano, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (1980); see also In re Gillmore, 29 Cal. 3d 418, 629 P.2d 1, 174 Cal. Rptr. 493 (1981) (same principle applied to a civilian pension plan).

Colorado

Divisible. In re Marriage Of Beckman and Holm, 800 P.2d 1376 (Colo. 1990) (nonvested military retirement benefits constitute marital property subject to division pursuant to § 14-10-113, C.R.S. (1987 Repl.Vol. 6B)). See also In re Hunt, 909 P.2d 525, (Colo. 1996), reversing a previous decision of its own, the Colorado Supreme Court holds that post-divorce increases in pay resulting from promotions are marital property subject to division and approves use of a formula

to define the marital share. In the formula discussed, final pay of the member at retirement is multiplied a percentage defined by 50% of a fraction wherein the numerator equals the number of years of overlap between marriage and service, and the denominator equals the number of years of total service of the member.

Connecticut

Probably divisible. Conn. Gen. Stat. 46b-81 (1986) gives courts broad power to divide property. Note Thompson v. Thompson, 183 Conn. 96, 438 A.2d 839 (1981) (nonvested civilian pension is divisible).

Delaware

Divisible. Smith v. Smith, 458 A.2d 711 (Del. Fam. Ct. 1983). Nonvested pensions are divisible; Donald R.R. v. Barbara S.R., 454 A.2d 1295 (Del. Sup. Ct. 1982).

District of Columbia

Divisible. See Barbour v. Barbour, 464 A.2d 915 (D.C. 1983) (vested but unmatured civil service pension held divisible; dicta suggests that nonvested pensions also are divisible).

Florida

Divisible. As of October 1, 1988, all vested and nonvested pension plans are treated as marital property to the extent that they are accrued during the

marriage. Fla. Stat. § 61.075(3)(a)4 (1988); see also § 3(1) of 1988 Fla. Sess. Law Serv. 342. These legislative changes appear to overrule the prior limitation in Pastore v. Pastore, 497 So. 2d 635 (Fla. 1986) (only vested military retired pay can be divided). This interpretation was recently adopted by the court in Deloach v. Deloach, 590 So.2d 956 (Fla. Dist Ct. App. 1991).

Georgia

Probably divisible. Cf. Courtney v. Courtney, 256 Ga. 97, 344 S.E.2d 421 (1986) (nonvested civilian pensions are divisible); Stumpf v. Stumpf, 249 Ga. 759, 294 S.E.2d 488 (1982) (military retired pay may be considered in establishing alimony obligations) see also Hall v. Hall, 51B.R. 1002 (1985) (Georgia divorce judgment awarding debtor's wife 38% of debtor's military retirement, payable directly from the United States to the wife, granted the wife a nondischargeable property interest in 38% of the husband's military retirement); Holler v. Holler, 257 Ga. 27, 354 S.E.2d 140 (1987) (the court "[a]ssum[ed] that vested and nonvested military retirement benefits acquired during the marriage are now marital property subject to equitable division," citing Stumpf and Courtney, but then decided that military retired pay could not be divided retroactively if it was not subject to division at the time of the divorce).

Hawaii

Divisible. Linson v. Linson, 1 Haw. App. 272, 618 P.2d 748 (1981); Cassiday v. Cassiday, 716 P.2d 1133 (Haw. 1986). In Wallace v. Wallace, 5 Haw. App. 55, 677 P.2d 966 (1984), the court ordered a Public Health Service employee (who is covered by the USFSPA) to pay a share of retired pay upon

reaching retirement age whether or not he retires at that point. He argued that this amounted to an order to retire, violating 10 U.S.C. § 1408(c)(3), but the court affirmed the order. In Jones v. Jones, 780 P.2d 581 (Haw. Ct. App. 1989), the court ruled that Mansell's limitation on dividing VA benefits cannot be circumvented by awarding an offsetting interest in other property. It also held that Mansell applies to military disability retired pay as well as VA benefits.

Idaho

Divisible. Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1975) (reinstated by Griggs v. Griggs, 197 Idaho 123, 686 P.2d 68 (1984)). Courts cannot circumvent Mansell's limitation on dividing VA benefits by using an offset against other property. Bewley v. Bewley, 780 P.2d 596 (Idaho Ct. App. 1989). See Leatherman v. Leatherman, 122 Idaho 247, 833 P.2d 105 (1992). A portion of husband's civil service annuity attributable to years of military service during marriage was divisible military service benefit and thus subject to statute relating to modification of divorce decrees to include division of military retirement benefits. Also see Balderson v. Balderson, 896 P.2d 956 (Idaho Sup. Ct. 1995)(cert. denied by the U.S. Supreme Court, 116 S.Ct. 179 (mem.) (affirming a lower court decision ordering a servicemember to pay spouse her community share of the military pension, even though he had decided to put off retirement), Mosier v. Mosier, 122 Idaho 37, 830 P.2d 1175 (1992), and Walborn v. Walborn, 120 Idaho 494, 817 P.2d 160 (1991).

Illinois

Divisible. In re Brown, 225 Ill. App. 3d 733, 587 N.E.2d 648 (1992); the Court cites Congress' enactment of the Spouses' Protection Act (Pub.L. No. 97-252, 96 Stat, 730-38 (1982) as the basis to permit the courts to treat pay of military personnel in accordance with the law of the jurisdiction of the court (In re Dooley, 137 Ill. App. 3d 407, 484 N.E.2d 894 (1985)). The court in Brown held that a military pension may be treated as marital property under Illinois law and is subject to the division provisions of 5/503 of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act). See In re Korper, 131 Ill. App. 3d 753, 475 N.E.2d 1333 (1985). Korper points out that under Illinois law a pension is marital property even if it is not vested. In Korper, the member had not yet retired, and he objected to the spouse getting the cash-out value of her interest in retired pay. He argued that the USFSPA allowed division only of "disposable retired pay," and state courts therefore are preempted from awarding the spouse anything before retirement. The court rejected this argument, thus raising the (unaddressed) question whether a spouse could be awarded a share of "retired" pay at the time the member becomes eligible for retirement (even if he or she does not retire at that point); see In re Luciano, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (1980) for an application of such a rule. Note also Ill. Stat. Ann. ch. 40, para. 510.1 (Smith-Hurd Supp. 1988) (allows modification of agreements and judgments that became final between 25 June 1981 and 1 February 1983 unless the party opposing modification shows that the original disposition of military retired pay was appropriate).

Indiana

Divisible, but watch for vesting requirements. Indiana Code § 31-1-11.5-2(d)(3) (1987) (amended in 1985 to provide that "property" for marital dissolution purposes includes, inter alia, "[t]he right to receive disposable retired pay, as defined in 10 U.S.C. § 1408(a), acquired during the marriage, that is or may be payable after the dissolution of the marriage"). The right to receive retired pay must be vested as of the date the divorce petition in order for the spouse to be entitled to a share (Kirkman v. Kirkman, 555 N.E.2d 1293 (Ind. 1990)), but courts should consider the nonvested military retired benefits in adjudging a just and reasonable division of property. In re Bickel, 533 N.E.2d 593 (Ind. Ct. App. 1989). See also Arthur v. Arthur, 519 N.E.2d 230 (Ind. Ct. App. 1988) (Second District ruled that § 31-1-11.5-2(d)(3) cannot be applied retroactively to allow division of military retired pay in a case filed before the law's effective date, which was 1 September 1985). But see Sable v. Sable, 506 N.E.2d 495 (Ind. Ct. App. 1987) (Third District ruled that § 31-1-11.5-2(d)(3) can be applied retroactively).

Iowa

Divisible. See especially In re Howell, 434 N.W.2d 629 (Iowa 1989). In Howell, the member had already retired in this case, but the decision may be broad enough to encompass nonvested retired pay as well. The court also ruled that disability payments from the Veterans Administration, paid in lieu of a portion of military retired pay, are not marital property. Finally, it appears the court intended to award the spouse a percentage of gross military retired pay, but it actually "direct[ed] that 30.5% of [the husband's] disposable retired pay, except

disability benefits, be assigned to [the wife] in accordance with section 1408 of Title 10 of the United States Code..." (emphasis added). The U.S. Supreme Court's Mansell decision may have overruled state court decisions holding courts have authority to divide gross retired pay.

(Note: A disabled veteran may be required to pay alimony and/or child support in divorce actions, even where his only income is veterans' disability and supplemental security income. See In re Marriage of Anderson, 522 N.W.2d 99 (Iowa App. 1994), applying Rose v. Rose, 481 U.S. 619, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987). The Iowa Court of Appeals ruled: "It is clear veteran's benefits are not solely for the benefit of the veteran, but for his family as well.")

Kansas

Divisible. Kan. Stat. Ann. § 23-201(b) (1987), effective July 1, 1987 (vested and nonvested military pensions are now marital property); In re Harrison, 13 Kan. App. 2d 313, 769 P.2d 678 (1989) (applies the statute and holds that it overruled the previous case law that prohibited division of military retired pay).

Kentucky

Divisible. Jones v. Jones, 680 S.W.2d 921 (Ky. 1984); Poe v. Poe, 711 S.W.2d 849 (Ky. Ct. App. 1986) (military retirement benefits are marital property even before they "vest"); Ky. Rev. Stat. Ann. § 403.190 (1994), expressly defines marital property to include retirement benefits.

Louisiana

Divisible. Swope v. Mitchell, 324 So. 2d 461 (La. 1975); Little v. Little, 513 So. 2d 464 (La. Ct. App. 1987) (nonvested and unmatured military retired pay is marital property); Warner v. Warner, 651 So. 2d 1339 (La. 1995) (confirming that 10-year test found in 10 U.S.C. § 1408(d)(2) is a prerequisite to direct payment, but not to award of a share of retired pay to a former spouse); Gowins v. Gowins, 466 So. 2d 32 (La. Sup. Ct. 1985) (soldier's participation in divorce proceedings constituted implied consent for the court to exercise jurisdiction and divide the soldier's military retired pay as marital property); Jett v. Jett, 449 So. 2d 557 (La. Ct. App. 1984); Rohring v. Rohring, 441 So. 2d 485 (La. Ct. App. 1983). See also Campbell v. Campbell, 474 So.2d 1339 (Ct. App. La. 1985) (a court can award a spouse a share of disposable retired pay, not gross retired pay, and a court can not divide VA disability benefits paid in lieu of military retired pay; this approach conforms to the dicta in the Mansell concerning divisibility of gross retired pay).

Maine

Divisible. Lunt v. Lunt, 522 A.2d 1317 (Me. 1987). See also Me. Rev. Stat. Ann. tit. 19, §722-A(6) (1989) (provides that the parties become tenants-in-common regarding property a court fails to divide or to set apart).

Maryland

Divisible. Nisos v. Nisos, 60 Md. App. 368, 483 A.2d 97 (1984) (applies Md. Fam. Law Code Ann. § 8-203(b), which provides that military pensions are

to be treated the same as other pension benefits; such benefits are marital property under Maryland law; see Deering v. Deering, 292 Md. 115, 437 A.2d 883 (1981)). See also Ohm v. Ohm, 49 Md. App. 392, 431 A.2d 1371 (1981) (nonvested pensions are divisible). "Window decrees" that are silent on division of retired pay cannot be reopened simply on the basis that Congress subsequently enacted the USFSPA. Andresen v. Andresen, 317 Md. 380, 564 A.2d 399 (1989).

Massachusetts

Divisible. Andrews v. Andrews, 27 Mass. App. 759, 543 N.E.2d 31 (1989). Here, the spouse was awarded alimony from military retired pay; she appealed, seeking a property interest in the pension. The trial court's ruling was upheld, but the appellate court noted that "the judge could have assigned a portion of the pension to the wife [as property]."

Michigan

Divisible. Keen v. Keen, 160 Mich. App. 314, 407 N.W.2d 643 (1987); Giesen v. Giesen, 140 Mich. App. 335, 364 N.W.2d 327 (1985); McGinn v. McGinn, 126 Mich. App. 689, 337 N.W.2d 632 (1983); Chisnell v. Chisnell, 82 Mich. App. 699, 267 N.W.2d 155 (1978). Note also Boyd v. Boyd, 116 Mich. App. 774, 323 N.W.2d 553 (1982) (only vested pensions are divisible, but what is a vested right is discussed broadly and discretion over what is marital property left to the trial court).

Minnesota

Divisible. Military retired pay not specifically addressed in statute. Case law has treated it as any other marital asset, subject to equitable division. Deliduka v. Deliduka, 347 N.W.2d 52 (Minn. Ct. App. 1984). This case also holds that a court may award a spouse a share of gross retired pay, but Mansell may have overruled state court decisions that they have the authority to divide gross retired pay. Note also Janssen v. Janssen, 331 N.W.2d 752 (Minn. 1983) (nonvested pensions are divisible).

Mississippi

Divisible. Powers v. Powers, 465 So. 2d 1036 (Miss. 1985). In July, 1994, a deeply divided Mississippi Supreme Court formally adopted the equitable distribution method of division of marital assets. Ferguson v. Ferguson, 639 So. 2d 921 (Miss. 1994), and Hemsley v. Hemsley 639 So. 2d 909 (Miss. 1994). Marital property for the purpose of a divorce is defined as being "any and all property acquired or accumulated during the marriage." This includes military pensions which are viewed as personal property and while USFSPA does not vest any rights in a spouse, a military pension is subject to being divided in a divorce. Pierce v. Pierce, 648 So. 2d 523 (Miss. 1995). In Pierce, the Court expressly held that a claim for division of property can only be viewed as separate and distinct from a claim for alimony. Since property division is made irrespective of fault or misconduct, military pensions may be divided even where the spouse has committed adultery, assuming that the facts otherwise justify an equitable division of property.

Missouri

Divisible. Only disposable retired pay is divisible. Moon v. Moon, 795 S.W.2d 511 (Mo. Ct. App. 1990). Fairchild v. Fairchild, 747 S.W.2d 641 (Mo. Ct. App. 1988) (nonvested and nonmatured military retired pay are marital property); Coates v. Coates, 650 S.W.2d 307 (Mo. Ct. App. 1983).

Montana

Divisible. In re Marriage of Kecskes, 210 Mont. 479, 683 P.2d 478 (1984); In re Miller, 37 Mont. 556, 609 P.2d 1185 (1980), vacated and remanded sub. nom. Miller v. Miller, 453 U.S. 918 (1981).

Nebraska

Divisible. Ray v. Ray, 222 Neb. 324, 383 N.W.2d 756 (1986); Neb. Rev. Stat. § 42-366(8) (1993) (military pensions are part of the marital estate whether vested or not and may be divided as property or alimony).

Nevada

Probably divisible. Tomlinson v. Tomlinson, 729 P.2d 1303 (Nev. 1986) (the court speaks approvingly of the USFSPA in dicta but declines to divide retired pay in this case involving a final decree from another state). Tomlinson was legislatively reversed by the Nevada Former Military Spouses Protection Act (NFMSPA), Nev. Rev. Stat. § 125.161 (1987) (military retired pay can be partitioned even if the decree is silent on division and even if it is foreign). The

NFMSPA has been repealed, however, effective March 20, 1989; see Senate Bill 11, 1989 Nev. Stat. 34. The Nevada Supreme Court subsequently has ruled that the doctrine of res judicata bars partitioning military retired pay where "the property settlement has become a judgment of the court"; see Taylor v. Taylor, 775 P.2d 703 (Nev. 1989). Nonvested pensions are community property. Gemma v. Gemma, 778 P.2d 429 (Nev. 1989). The spouse has the right to elect to receive his or her share when the employee spouse becomes retirement eligible, whether or not retirement occurs at that point. Id.

New Hampshire

Divisible. "Property shall include all tangible and intangible property and assets...belonging to either or both parties, whether title to the property is held in the name of either or both parties. Intangible property includes...employment benefits, [and] vested and non-vested pensions or other retirement plans.... [T]he court may order an equitable division of property between the parties. The court shall presume that an equal division is an equitable distribution...." N.H. Rev. Stat. Ann. § 458:16-a (1987) (effective Jan 1, 1988). This provision was relied on by the New Hampshire Supreme Court in Blanchard v. Blanchard, 578 A.2d 339 (N.H. 1990), when it overruled Baker v. Baker, 120 N.H. 645, 421 A.2d 998 (1980) (military retired pay not divisible as marital property, but it may be considered "as a relevant factor in making equitable support orders and property distributions").

New Jersey

Divisible. Castiglioni v. Castiglioni, 192 N.J. Super. 594, 471 A.2d 809 (N.J. 1984); Whitfield v. Whitfield, 222 N.J. Super. 36, 535 A.2d 986 (N.J. Super. Ct. App. Div. 1987) (nonvested military retired pay is marital property); Kruger v. Kruger, 139 N.J. Super. 413, 354 A.2d 340 (N.J. Super. Ct. App. Div. 1976), aff'd, 73 N.J. 464, 375 A.2d 659 (1977). Post-divorce cost-of-living raises are divisible; Moore v. Moore, 553 A.2d 20 (N.J. 1989) (police pension).

New Mexico

Divisible. Walentowski v. Walentowski, 100 N.M. 484, 672 P.2d 657 (N.M. 1983)(USFSPA applied); Stroshine v. Stroshine, 98 N.M. 742, 652 P.2d 1193 (1982); LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 (1969). See also White v. White, 105 N.M. 800, 734 P.2d 1283 (Ct. App. 1987) (court can award share of gross retired pay; however, Mansell may have overruled state court decisions holding courts have authority to divide gross retired pay). In Mattox v. Mattox, 105 N.M. 479, 734 P.2d 259 (1987), in dicta the court cited the California Gillmore case with approval, suggesting that a court can order a member to begin paying the spouse his or her share when the member becomes eligible to retire - even if the member elects to remain in active duty.

New York

Divisible. Pensions in general are divisible; Majauskas v. Majauskas, 61 N.Y.2d 481, 463 N.E.2d 15, 474 N.Y.S.2d 699 (1984). Most lower courts hold that nonvested pensions are divisible; see, e.g., Damiano v. Damiano, 94 A.D.2d

132, 463 N.Y.S.2d 477 (N.Y. App. Div. 1983). Case law seems to treat military retired pay as subject to division; e.g., Lydick v. Lydick, 130 A.D.2d 915, 516 N.Y.S.2d 326 (N.Y. App. Div. 1987); Gannon v. Gannon, 116 A.D.2d 1030, 498 N.Y.S.2d 647 (N.Y. App. Div. 1986). Disability payments are separate property as a matter of law, but a disability pension is marital property to the extent it reflects deferred compensation; West v. West, 101 A.D.2d 834, 475 N.Y.S.2d 493 (N.Y. App. Div. 1984).

North Carolina

Divisible but watch for vesting requirements. N.C. Gen. Stat. § 50-20(b) (1988) expressly declares vested military pensions to be marital property; the pension must be vested as of the date the parties separate from each other. In Milam v. Milam, 373 S.E.2d 459 (N.C.App. 1988), the court ruled that a warrant officer's retired pay had "vested" when he reached the 18-year "lock-in" point. In George v. George, 444 S.E.2d 449 (N.C.App. 1994), the court held that an enlisted member's right to retirement benefits vests when he/she has completed twenty years of service. In Lewis v. Lewis, 350 S.E.2d 587 (N.C.App. 1986) the court held that a divorce court can award a spouse a share of gross retired pay, but, because of the wording (at that time) of the state statute, the amount cannot exceed 50% of the retiree's disposable retired pay; Mansell, 490 U.S. at 589, may have overruled the court's decision in part as to dividing gross pay. The parties are not, however, barred from a consensual division of military retired pay, even though it is "nonvested" separate property, and an agreement or court order by consent that divides such pension rights will be upheld. Hoolapa v. Hoolapa, 412 S.E.2d 112 (N.C.App. 1992). Attorneys considering valuation issues should also review Bishop v. Bishop, 440 S.E.2d 591 (N.C.App. 1994), which held that

valuation must be determined as of the date of separation and must be based on a present value of pension payments that the retiree would be entitled to receive if he or she retired on the date of marital separation, or when first eligible to retire, if later. Subsequent pay increases attributable to length of service or promotions are not included.

North Dakota

Divisible. Delorey v. Delorey, 357 N.W.2d 488 (N.D. 1984). See also Morales v. Morales, 402 N.W.2d 322 (N.D. 1987) (equitable factors can be considered in dividing military retired pay, so 17.5% award to 17-year spouse is affirmed), and Knoop v. Knoop, 542 N.W.2d 114 (N.D. 1996) (confirms that definition of "disposable retired pay" as defined in 10 U.S.C. § 1408 provides a limit on what states are authorized to divide as marital property, but holds that the USFSPA does not require the term "retirement pay" to be interpreted as "disposable retired pay." Knoop is also of interest because it addresses a waiver of retirement pay associated with the Dual Compensation Act, and the court acknowledges that once 50% of "disposable retired pay" is paid out in satisfaction of one or more orders dividing military retired pay as property, the orders are deemed satisfied by federal law (referencing 1990 amendment to 10 U.S.C. § 1408(e)(1)).

Ohio

Divisible. See Lemon v. Lemon, 42 Ohio App. 3d 142, 537 N.E.2d 246 (1988) (nonvested pensions are divisible as marital property **where some evidence of value demonstrated**). But also see, King v. King, 78 Ohio App. 3d

599, 605 N.E.2d 970 (1992) (Trial court abused its discretion by retaining jurisdiction to divide a military pension that would not vest for nine years where no evidence of value demonstrated); Cherry v. Figart, 86 Ohio App. 3d 123, 620 N.E.2d 174 (1993) (distinguishing King by affirming division of nonvested pension where parties had agreed to divide the retirement benefits and suit was brought for enforcement only - the initial judgment incorporating the agreement had not been appealed); and Ingalls v. Ingalls, 624 N.E.2d 368 (Ohio 1993) (affirming division of nonvested military retirement benefits consistent with agreement of the parties expressed at trial).

Oklahoma

Divisible. Stokes v. Stokes, 738 P.2d 1346 (Okla. 1987) (based on a statute that became effective on 1 June 1987). The state Attorney General had earlier opined that military retired pay was divisible, based on the prior law. Only a pension vested at the time of the divorce, however, is divisible, Messinger v. Messinger, 827 P.2d 865 (Okla. 1992). A former spouse is entitled to retroactive division of retiree's military pension pursuant to their property settlement agreement that provided that the property settlement was subject to modification if the law in effect at the time of their divorce changed to allow such a division at a later date.

Oregon

Divisible. In re Manners, 68 Or. App. 896, 683 P.2d 134 (1984); In re Vinson, 48 Or. App. 283, 616 P.2d 1180 (1980). See also In re Richardson, 307

Or. 370, 769 P.2d 179 (1989) (nonvested pension plans are marital property). The date of separation is the date used for classification as marital property.

Pennsylvania

Divisible. Major v. Major, 359 Pa. Super. 344, 518 A.2d 1267 (1986) (nonvested military retired pay is marital property).

Puerto Rico

Not divisible as marital property. Delucca v. Colon, 119 P.R. Dec. 720 (1987) (citation to original Spanish version; English translation can be found at 119 P.R.Dec. 765), overruling Torres v. Robles, 115 P.R. Dec. 765 (1984), which had held that military retired pay is divisible. In overruling Torres, the court in Delucca reestablished retirement pensions as separate property of the spouses consistent with its earlier decision in Maldonado v. Superior Court, 100 P.R.R. 369 (1972). Also see Carrero v. Santiago, 93 JTS 103 (1993) (citation to original Spanish version; English translation not yet available), which cites Delucca v. Colon with approval. Note that pensions may be considered in setting child support and alimony obligations.

Rhode Island

Divisible. R.I. Pub. Laws § 15-5-16.1 (1988) gives courts very broad powers over the parties' property to effect an equitable distribution. Implied consent by the soldier cannot be used, however, to satisfy the jurisdictional requirements of 10 U.S.C. § 1408(c)(4). Flora v. Flora, 603 A.2d 723 (R.I. 1992).

South Carolina

Divisible. Tiffault v. Tiffault, 401 S.E.2d 157 (S.C.1991), holds that vested military retirement benefits constitute an earned property right which, if accrued during the marriage, is subject to equitable distribution. Nonvested military retirement benefits are also subject to equitable division, Ball v. Ball, 430 S.E.2d 533 (S.C. Ct. App. 1993) (NCO acquired a vested right to participate in a military pension plan when he enlisted in the army; this right, which is more than an expectancy, constitutes property subject to division). But see Walker v. Walker, 368 S.E.2d 89 (S.C. Ct. App. 1988) (wife lived with parents during entire period of husband's naval service; since she made no homemaker contributions, she was not entitled to any portion of the military retired pay).

South Dakota

Divisible. Gibson v. Gibson, 437 N.W.2d 170 (S.D. 1989) (the court states that military retired pay is divisible--in this case, it was reserve component retired pay where the member had served 20 years but had not yet reached age 60); Radigan v. Radigan, 17 Fam. L. Rep. (BNA) 1202 (S.D. Sup. Ct. Jan. 23, 1991) (husband must share with ex-wife any increase in his retired benefits that results from his own, post divorce efforts); Hautala v. Hautala, 417 N.W.2d 879 (S.D. 1987) (trial court awarded spouse 42% of military retired pay, and this award was not challenged on appeal); Moller v. Moller, 356 N.W.2d 909 (S.D. 1984) (the court commented approvingly on cases from other states that recognize divisibility but declined to divide retired pay here because a 1977 divorce decree was not appealed until 1983). See generally Caughron v. Caughron, 418 N.W.2d

791 (S.D. 1988) (the present cash value of a nonvested retirement benefit is marital property); Hansen v. Hansen, 273 N.W.2d 749 (S.D. 1979) (vested civilian pension is divisible); Stubbe v. Stubbe, 376 N.W.2d 807 (S.D. 1985) (civilian pension divisible; the court observed that "this pension plan is vested in the sense that it cannot be unilaterally terminated by [the] employer, though actual receipt of benefits is contingent upon [the worker's] survival and no benefits will accrue to the estate prior to retirement").

Tennessee

Divisible. Tenn. Code Ann. § 36-4-121(b)(1) (1988) specifically defines all vested pensions as marital property. In 1993, the Tennessee Supreme Court affirmed a trial court's approval of a separation agreement after determining that the agreement divided a non-vested pension as marital property. Towner v. Towner, 858 S.W.2d 888 (Tenn. 1993). In 1994, the Tennessee Court of Appeals held that the Tennessee code's reference to vested pensions was illustrative and not exclusive. As a result, the court determined that non-vested military pensions can properly be characterized as marital property. Kendrick v. Kendrick, 902 S.W.2d 918 (Tenn.Ct.App. 1994).

(Note: A disabled veteran may be required to pay alimony and/or child support in divorce actions, even where his only income is veterans' disability and supplemental security income. See Rose v. Rose, 481 U.S. 619, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987)(Supreme Court upheld exercise of contempt authority by Tennessee court over veteran who would not pay child support, finding that VA benefits were intended to take care of not just the veteran. Justice White in dissent argued unsuccessfully that the state's authority was preempted by the bar

to garnishing VA disability payments, and federal discretion to divert some of the VA benefits to family members in certain cases.))

Texas

Divisible. Cameron v. Cameron, 641 S.W.2d 210 (Tex. 1982). See also Grier v. Grier, 731 S.W.2d 936 (Tex. 1987) (a court can award a spouse a share of gross retired pay, but post-divorce pay increases constitute separate property; Mansell may have overruled Grier in part). Pensions need not be vested to be divisible. Ex Parte Burson, 615 S.W.2d 192 (Tex. 1981), held that a court cannot divide VA disability benefits paid in lieu of military retired pay; this ruling is in accord with Mansell.

Utah

Divisible. Greene v. Greene, 751 P.2d 827 (Utah Ct. App. 1988). The case clarifies that non-vested pensions can be divided under Utah law, and in dicta it suggests that only disposable retired pay is divisible, not gross retired pay. But see Maxwell v. Maxwell, 796 P.2d 403 (Utah App. 1990) (because of a stipulation between the parties, the court ordered a military retiree to pay his ex-wife one-half the amount he had overwithheld from his retired pay for taxes).

Vermont

Probably divisible. Vt. Stat. Ann. tit. 15, § 751 (1988) provides that "The court shall settle the rights of the parties to their property by...equit[able] divi[sion]. All property owed by either or both parties, however and whenever

acquired, shall be subject to the jurisdiction of the court. Title to the property . . . shall be immaterial, except where equitable distribution can be made without disturbing separate property." The Connecticut Supreme Court recently held in Krafik v. Krafik, 21 Fam. Law Rep. 1536 (1995), that vested pension benefits are divisible as marital property in divorce. Although the issue was not raised in Krafik, the court noted that the legislative and logical basis for dividing vested pension benefits would apply to unvested pension benefits as well.

Virginia

Divisible. Va. Ann. Code § 20-107.3 (1988) defines marital property to include all pensions, whether or not vested. See also Mitchell v. Mitchell, 4 Va. App. 113, 355 S.E.2d 18 (1987); Sawyer v. Sawyer, 1 Va. App. 75, 335 S.E.2d 277 (Va. Ct. App. 1985) (these cases hold that military retired pay is subject to equitable division). Also see Owen v. Owen, 419 S.E.2d 267 (Va.Ct.App. 1992) (settlement agreement's guarantee/indemnification clause requires the retiree to pay the same amount of support to the spouse despite the retiree beginning to collect VA disability pay - held not to violate Mansell).

Washington

Divisible. Konzen v. Konzen, 103 Wash. 2d 470, 693 P.2d 97, cert. denied, 473 U.S. 906 (1985); Wilder v. Wilder, 85 Wash. 2d 364, 534 P.2d 1355 (1975) (nonvested pension held to be divisible); Payne v. Payne, 82 Wash. 2d 573, 512 P.2d 736 (1973); In re Smith, 98 Wash. 2d 772, 657 P.2d 1383 (1983).

West Virginia

Divisible. Butcher v. Butcher, 357 S.E.2d 226 (W.Va. 1987) (vested and nonvested military retired pay is marital property subject to equitable distribution, and a court can award a spouse a share of gross retired pay; however, Mansell may have overruled state court decisions holding courts have authority to divide gross retired pay)

Wisconsin

Divisible. Thorpe v. Thorpe, 123 Wis. 2d 424, 367 N.W.2d 233 (Wis. Ct. App. 1985); Pfeil v. Pfeil, 115 Wis. 2d 502, 341 N.W.2d 699 (Wis. Ct. App. 1983). See also Leighton v. Leighton, 81 Wis. 2d 620, 261 N.W.2d 457 (1978) (nonvested pension held to be divisible) and Rodak v. Rodak, 150 Wis. 2d 624, 442 N.W.2d 489, (Wis. Ct. App. 1989) (portion of civilian pension that was earned before marriage is included in marital property and subject to division).

Wyoming

Divisible. Parker v. Parker, 750 P.2d 1313 (Wyo. 1988) (nonvested military retired pay is marital property; 10-year test is a prerequisite to direct payment of military retired pay as property, but not to division of military retired pay as property). See also Forney v. Minard, 849 P.2d 724 (Wyo. 1993) (Affirms award of 100% of "disposable retired pay" to former spouse as property, but acknowledges that only 50% of this award can be paid directly. Note that this holding is inconsistent with 1990 amendment to USFSPA at 10 USC § 1408(e)(1) which deems all orders dividing military retired pay as property satisfied once a

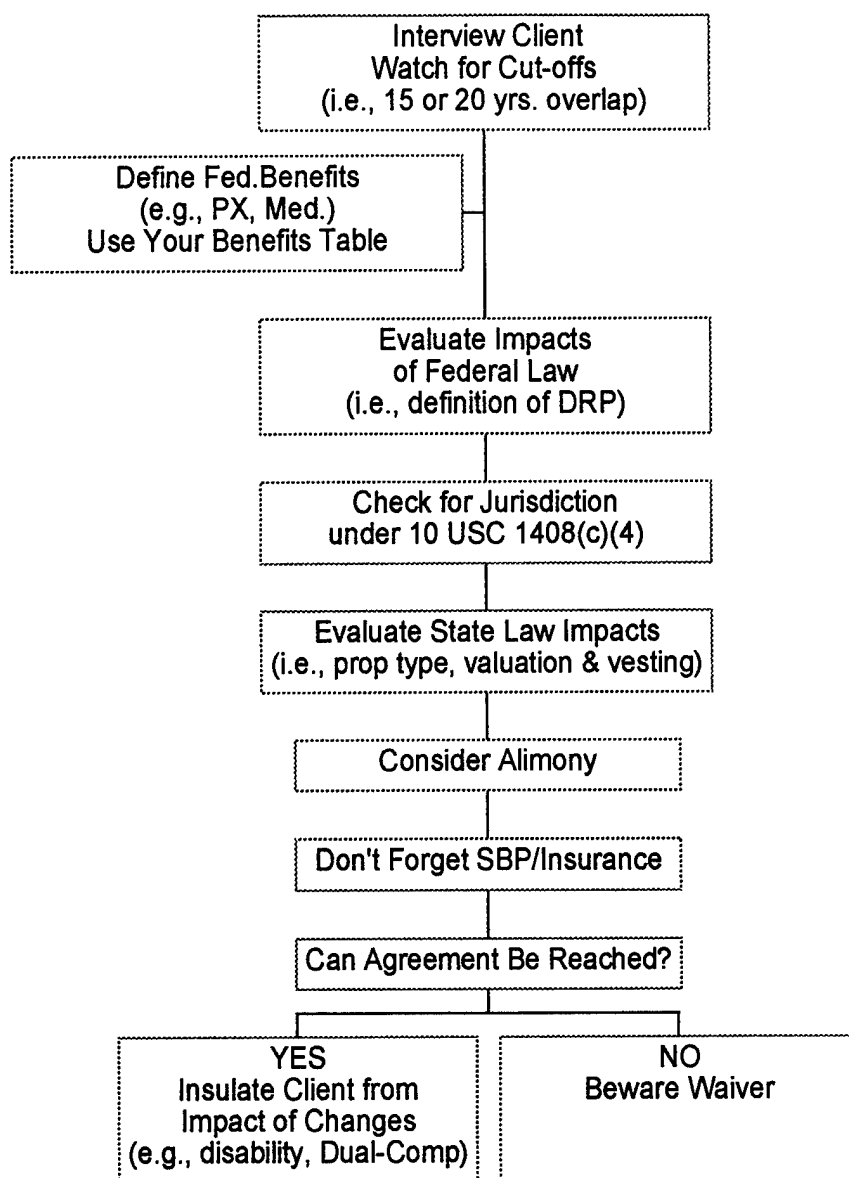
threshold of 50% of the "disposable retired pay" is reached - see the discussion in Knoop v. Knoop referenced under the North Dakota section of this guide.)

Canal Zone

Divisible. Bodenhorn v. Bodenhorn, 567 F.2d 629 (5th Cir. 1978).

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A Roadmap to the USFSPA



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APPENDIX D

OJAG Legal Assistance (Code 36)
(703) 325-7928/DSN 221-7928
8 July 1994

QUICK GUIDE TO UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

Note: This Quick Guide to USFSPA was first issued, in a slightly different version, for distribution at the Navy JAG Conference in March 1992. Following modest revision to include points of contact for other than the naval services, it was published in The LAMPlighter, a quarterly newsletter published by the American Bar Association Standing Committee on Legal Assistance for Military Personnel (Vol. 4, No. 1 - Fall 1992). It is intended to serve as a desktop guide and starting point for research into the regulations and interpretive case law that flesh out USFSPA.

Background:

The Uniformed Services Former Spouses' Protection Act (USFSPA), passed by Congress in 1982 and amended a number of times since then, is intended to place the former spouse in substantially the same position that he or she would have been in during the military retirement period had the marriage not been ended by divorce, dissolution or annulment. The statute seeks to accomplish this by:

1. Allowing the states to treat disposable military retired pay as marital or community property, per each state's law; note that there is no federal right to any portion of military retired pay under USFSPA.
2. Allowing certain former spouses to receive their share, up to a ceiling of 50%, of disposable military retired pay directly from military finance centers.
3. Allowing some former spouses to continue receiving commissary, exchange, and health care benefits.
4. Allowing former spouses to be designated as Survivor Benefit Plan beneficiaries.
5. Authorizing certain former spouses who are victims of abuse to receive a court-ordered share of military retired pay even though the military member was not retired, but rather was punitively or administratively because of the misconduct involving abuse (special rules and requirements apply).

Discussion:

A. KEY CONCEPTS AND TERMS

1. **Disposable Retired Pay.** 10 U.S.C. § 1408(a)(4), 32 C.F.R § 63.6e(2), Military Retired Pay Manual, DoD 1340.12M. This is gross retired pay entitlement less various authorized deductions. A change in 10 U.S.C. § 1408(a)(4) (amendment of 5 November 1990, Pub.L. 101-510, § 555; 104 Stat. 1569) modified the definition of disposable retired pay for divorces final after 3 February 1991 to include only the following authorized deductions:

- a. Amounts owed by the member to the United States that are related to the receipt of retired pay (e.g., recoupment of overpayments).
- b. Forfeitures ordered by a court-martial.

- c. — That portion which is military disability retired pay under 10 U.S.C. Chapter 61.
- d. That portion which is waived in favor of accepting Veterans' Affairs disability pay.
- e. Premiums paid for Government life insurance, or deductions to provide SBP annuity coverage in favor of a current or former spouse.
- f. Other amounts required by law to be deducted that relate to a person's entitlement to retired pay (e.g., dual compensation restrictions).

For divorces final prior to 3 February 1991, the authorized deductions to compute disposable retired pay differ significantly, and include: Federal employment taxes and income taxes withheld, including properly documented supplemental withholding consistent with the member's expected tax liability; and State employment taxes and income taxes withheld when the member voluntarily requests same and the military service has entered into an agreement with the particular State to withhold from retired pay.

2. **20/20/20 Former Spouse:** the military member has completed at least 20 years of creditable service; the spouse has been married to the military member for at least 20 years at date of final decree of divorce, dissolution, or annulment; and the period of marriage overlaps the period of creditable service by at least 20 years. Certain "basic benefits" accrue to 20/20/20 former spouses; see next section.

3. **20/20/15 Former Spouse:** the military member has completed at least 20 years of creditable service; the spouse has been married to the military member for at least 20 years at date of final decree of divorce, dissolution, or annulment; and the period of marriage overlaps the period of creditable service by at least 15 years. Limited "basic benefits" accrue to 20/20/15 former spouses; see next section.

4. **10/10 Former Spouse:** the spouse has been married to the military member for at least 10 years at date of final decree of divorce, dissolution, or annulment; and the period of marriage overlaps the period of creditable service by at least 10 years. The *only* significance of this status is that it is the minimum eligibility criteria for obtaining direct payment from the military finance center of a former spouse's court-ordered share of disposable retired pay.

B. BASIC BENEFITS

1. **Commissary and Exchange Benefits.** 10 U.S.C. §§ 1062 and 1072(2)(F). Unremarried former spouse is treated the same as the military retiree; i.e., the 20/20/20 former spouse is authorized full commissary and exchange benefits. While these benefits are suspended upon subsequent marriage, the privileges "revive" when the subsequent marriage is terminated in any manner. These benefits are not available to 20/20/15 former spouses.

2. **Medical Benefits.** 10 U.S.C. §§ 1072(2)(F), 1076 and 1086. Unremarried former spouse is treated the same as the spouse of deceased military retiree. The 20/20/20 former spouse (and a 20/20/15 former spouse whose divorce was final prior to 1 April 1985) is authorized full medical care, including space-available inpatient and outpatient care at military treatment facilities, and CHAMPUS coverage (until the former spouse becomes eligible for Medicare). These benefits are *extinguished* upon subsequent marriage, so the privileges will

not "revive" when the subsequent marriage is terminated by any cause other than annulment. The unremarried 20/20/15 spouse is entitled to full military medical benefits only for a transitional period of 1 year, after which the former spouse may purchase a DoD-negotiated conversion health policy. The current conversion policy is Uniformed Services Voluntary Insurance Program (U.S. VIP) with Mutual of Omaha; current rates, a coverage description, and a reproducible application form may be obtained from each service's coordinator for the former spouse program.

3. *Retired Pay Benefits.* 10 U.S.C. § 1408; and 32 C.F.R. Part 63.

a. The issues of whether military retired pay will be treated as marital or community property (*vice* as an income component for computing alimony or support payments), and whether and in what amount military retired pay will be divided between the two parties, will be decided *according to state law*; while USFSPA permits military pay to be treated as marital or community property, it does not so mandate.

b. USFSPA does not create a federal right in favor of the former spouse to receive any portion of a member's military retired pay, nor does the statute mandate or suggest a maximum, minimum or typical amount, percentage, or formula for computing a former spouse's share. The court exercising jurisdiction over the case will determine whether to divide military retired pay between the parties and, if so, in what amounts or percentages, using that state's laws, regulations, and procedures, and weighing the evidence and arguments advanced by each of the parties. If a court awards a portion of military retired pay to a former spouse, but the member is still on active duty, the effect of the court order is stayed until retirement occurs - the member will not be forced to retire to satisfy a court order.

c. USFSPA affords a right to receive direct payments from the DFAS center of the portion of a military member's disposable retired pay ordered in favor of a former spouse by a court having appropriate jurisdiction over the member. This direct payment option is limited those former spouses who meet *at least* the 10/10 criteria, is subject to a ceiling of 50% of disposable retired pay, and may require a court order that expresses the former spouse share either as a whole dollar amount or as a specific percentage of the member's disposable retired pay.

4. *Survivor Benefit Plan (SBP).* 10 U.S.C. §§ 1447(6), 1448(b), and 1450.

a. SBP is an annuity that allows retired members (both active duty and reserve) to provide continued income to named beneficiaries in the event of the retiree's death. A retiring member will be enrolled in SBP unless the member declines to participate. This election must be made before retirement occurs; once a determination whether to participate in SBP is implemented, the election is, with very limited exceptions, irrevocable.

b. A retiring member may elect coverage in favor of a former spouse, either to comply with a court order mandating the election, or to honor an agreement between the parties, or voluntarily. If coverage is elected, the amount of the premium may then be deducted when computing disposable retired pay.

c. If divorce occurs after retirement, and the member did not elect to participate in SBP when retiring, the divorce does not "revive" the option to participate. Thus, state divorce courts should not order these retirees to provide SBP protection for former spouses because Federal law will not permit the retirees to comply.

d. If divorce occurs after retirement and the member had initially elected to participate in SBP when retiring, the dissolution terminates that former spouse's eligibility to be a SBP beneficiary under the member's initial election in favor of the "spouse," and it constitutes a ground for the member to revoke entirely the election to participate in SBP. A court may order continued participation by the member in favor of the former spouse, or the member may wish to continue such coverage, in which case *former spouse coverage* must be elected within one year of the date of the final divorce decree.

e. There is no possibility under current law to split SBP between a current spouse and a former spouse.

C. REFERENCES

Many notes and articles have appeared in law reviews and other professional publications commenting on various aspects of USFSPA. An excellent comprehensive treatment of USFSPA has been published by the Army JAG School: *Uniformed Services Former Spouses' Protection Act (Outline and Reference Materials)*, Publication JA-274.

D. POINTS OF CONTACT

1. USFSPA benefits and eligibility questions.

a. For Navy, contact Coordinator, Former Spouse Program, Bureau of Naval Personnel (PERS 334C), Washington, DC 20370-5641, telephone 1-800-443-9297, (703) 614-4261/3808, DSN 224-4261/3808.

b. For Marine Corps, contact Marine Corps Retired Affairs Office (Code MMSR-6), HQMC, Washington DC 20380-0001, 1-800-336-4649, (703) 614-1958, DSN 224-1958.

c. For Army, contact Office of General Counsel, Defense Finance and Accounting Service - Indianapolis Center (Code DFAS-IN-DG), Indianapolis IN 46249-0160, (317) 542-2155, DSN 699-2154.

d. For Air Force, contact HQ AFMPC/DPMDOP, Randolph AFB TX 78150-6001, (512) 652-2089, DSN 487-2089.

2. Retired pay questions.

a. For Navy, contact Defense Finance and Accounting Service - Cleveland Center (Code DG), Anthony J. Celebrezze Federal Building, 1240 E. 9th Street, Cleveland, OH 44199-2055, telephone (216) 522-5396, DSN 580-5396.

b. For Marine Corps, contact Defense Finance and Accounting Service - Kansas City Center (Code DG), Kansas City, MO 64197-0001, telephone (816) 926-7103, DSN 465-7103.

c. For Army, contact Retired Pay Operations, Defense Finance and Accounting Service - Indianapolis Center (Code DFAS-IN-R), Indianapolis IN 46249-1536, (317) 542-2931, DSN 699-2931.

d. For Air Force, Defense Finance and Accounting Service - Cleveland Center (Code DG), Anthony J. Celebrezze Federal Building, 1240 E. 9th Street, Cleveland, OH 44199-2055, telephone (216) 522-5396, DSN 580-5396.

3. SBP questions.

a. For Navy, contact Defense Finance and Accounting Service - Cleveland Center, Retired Pay Department (Code JR), Anthony J. Celebrezze Federal Building, 1240 E. 9th Street, Cleveland, OH 44199-2058, telephone (216) 522-5535, DSN 580-5535.

b. For Marine Corps, contact Defense Finance and Accounting Service - Kansas City Center (DFAS-KC/ER), Kansas City, MO 64197-0001, telephone (816) 926-7196, DSN 465-7196.

c. For Army, contact Office of General Counsel, Defense Finance and Accounting Service - Indianapolis Center (Code DFAS-IN-DG), Indianapolis IN 46249-0160, (317) 542-2151, DSN 699-2151.

d. For Air Force, contact Defense Finance and Accounting Service - Denver Center (Code RT), Denver CO 80279-5000, (303) 676-6139, DSN 926-6139.

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APPENDIX E

UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT QUICK REFERENCE GUIDE TO FORMER SPOUSE LEGISLATION AS CODIFIED IN TITLE 10

RETIRED PAY

10 U.S.C. 1408.....Payment of retired pay in compliance with court orders

The Uniformed Services Former Spouses' Protection Act

10 U.S.C. 1408(a)...Definitions

Sets out key definitions including ones for "court," "court order," "final decree," and "disposable retired pay".

10 U.S.C. 1408(b)...Effective service of process

Sets out requirements for an effective service of court orders pertaining to disposable retired pay.

10 U.S.C. 1408(c)...Authority for court to treat retired pay as property of the member and spouse.

Establishes the ability for state courts to divide disposable retired pay in accordance with state law. Sets the effective date as 25 June 1981. Lays out the jurisdictional requirements for a court to divide disposable retired pay.

10 U.S.C. 1408(d)...Payments by secretary concerned to spouse or former spouse

Establishes right for direct payment to a former spouse who meets the 10 year overlap of marriage and creditable service. Sets termination of these payments upon the death of either the member or the former spouse.

10 U.S.C. 1408(e)...Limitations

Limits the total amount of disposable retired pay payable under any and all court orders to 50% of disposable retired pay. In the event of several court orders, disposable retired pay is paid on a first-come, first-served basis.

10 U.S.C. 1408(f)...Immunity of officers and employees of United States

Gives immunity to employees paying out disposable retired pay to retirees, spouses or former spouses if acting pursuant to a court order regular on its face.

10 U.S.C. 1408(g)...Notice to member of service of court order on secretary concerned

Requires the service member be provided a copy of the court order within 30 days of receipt.

10 U.S.C. 1408(h)...Benefits for dependents who are victims of abuse by members losing right to retired pay

Provides for benefits to spouses or former spouses who are victims of abuse and the service member loses his right to retirement pay as a result of misconduct. Service member must be retirement eligible on the basis of years of service. Remarriage terminates right to 1408(h) benefits. Benefits can resume if the second marriage is terminated by death, annulment, or divorce. Exchange and commissary privileges are included.

EXCHANGE AND COMMISSARY BENEFITS

10 U.S.C. 1059.....Dependents of members separated for dependent abuse: transitional compensation; commissary and exchange benefits

Provides for up to 36 months of transitional benefits (see 10 U.S.C. 1078a) to a spouse or former spouse of a member separated administratively or judicially for a dependent-abuse offense. Cannot receive payment as a spouse under this section and 1408(h)(1)--if both apply the former spouse chooses which to receive. These payments cease upon remarriage. Maintain exchange and commissary privileges while receiving these transitional benefits.

10 U.S.C. 1062.....Certain former spouses

Provides exchange and commissary privileges to former spouse who is married and meets the 20/20/20 test.

HEALTH AND DENTAL BENEFITS

10 U.S.C. 1072.....Definitions

Provides for full medical and dental care privileges for unremarried former spouse who meets 20/20/20 and is not covered by an employer-sponsored health plan or who meets 20/20/15 AND date of divorce is 1 April 85 or before.

10 U.S.C. 1078a.....Continued health benefits coverage

Provides for continued coverage of health benefits, under a pay as you go insurance program similar to CHAMPUS (but it is NOT CHAMPUS). Requires an election by the former spouse.

10 U.S.C. 1086a.....Certain former spouses: extension of period of eligibility for health benefits

Provides for opportunity for purchase of additional 2 years of health coverage under 10 U.S.C. 1078a.

SURVIVOR'S BENEFIT PLAN AND FORMER SPOUSES

10 U.S.C. 1447.....Definitions

Defines former spouse for purposes of the Survivor Benefit Plan (SBP).

10 U.S.C. 1448.....Application of plan

Defines eligibility of former spouses as beneficiaries of SBP.

10 U.S.C. 1450.....Payment of annuity: beneficiaries

Designates payments to begin day after death of covered service member. Provides that the election of the former spouse cannot be changed without the consent of the former spouse or court order modification.

10 U.S.C. 1451.....Amount of annuity

Sets out computation rules for determining annuity amount.

10 U.S.C. 1452.....Reduction in retired pay

Provides for reduction of annuity.

10 U.S.C. 1455.....Regulations

Provides for notice of elections and effects of such elections.

10 U.S.C. 1456.....Supplemental spouse coverage: establishment of plan; definitions

Provides ability to purchase supplemental SBP for former spouse coverage.

10 U.S.C. 1457.....Supplemental spouse coverage: payment of annuity; amount

Provides calculation of additional annuity.

10 U.S.C. 1458.....Supplemental spouse coverage: eligible participants; elections of coverage

Makes supplemental coverage optional to the service member to provide for a former spouse.

10 U.S.C. 1459.....Former spouse coverage: special rules

Sets out provision for former spouse to file divorce decree entitling former spouse to SBP designation with DFAS within one year of the court order awarding SBP designation.

10 U.S.C. 1460.....Supplemental spouse coverage: reductions in retired pay

Provides for reductions in retired pay for those electing supplemental spouse coverage.

APPENDIX F

Defense Finance and Accounting Service
Cleveland Center

FORMER SPOUSES' PROTECTION ACT BULLETIN

DFAS-CL 1342.3-B

October 24, 1995

Public Law 97-252 was enacted on September 8, 1982, effective on February 1, 1983, and amended on October 19, 1984, by Public Law 98-525 and November 5, 1990, by Public Law 101-510. This Law is cited as the "Uniformed Services Former Spouses' Protection Act" and has been codified as Title 10, United States Code, Section 1408.

The Act recognizes the right of state courts to distribute military retirement or retainer pay to a spouse or former spouse and provides a method for enforcement of these orders through the Department of Defense (DoD). The Act itself does not provide for an automatic entitlement to the former spouse of a portion of the member's pay. Disability retired pay cannot be divided under this Act. However, with respect to court orders issued on or after November 14, 1986, it is possible to enforce an order dividing military retired pay as against that portion of a member's pay which is not based upon disability. The Act also permits the direct payment of current child support or alimony as explained later.

While courts may choose to award a portion of the member's retired or retainer pay to a spouse or former spouse married for a shorter period, enforcement of a court order dividing retired or retainer pay as property of the parties under this Act, is limited to those cases where the parties were married to each other for at least 10 years during which the member performed at least 10 years of creditable military service. The 10 year marriage requirement does not apply to the direct payment of retired/retainer pay for child support or alimony.

An order dividing retired or retainer pay as property cannot be honored by the Department of Defense unless the court issuing the order had jurisdiction over the member by reason of, (1) his residence in the territorial jurisdiction of the court (other than because of his military assignment), (2) his domicile in the territorial jurisdiction of the court, or (3) his consent to the jurisdiction of the court. These jurisdictional requirements do not apply to direct payment of child support or alimony. In all cases the rights of the member, under the Soldiers and Sailors

Civil Relief act of 1940, must have been observed during the state court proceeding.

The right to the division of pay terminates upon the death of the member or his spouse or former spouse, unless otherwise provide in the court order to terminate earlier.

Only the former spouse or the attorney representing the former spouse may make application under the Act. The service member cannot. If the spouse or former spouse choses not to make application under the Act to enforce an order dividing military retired pay and/or awarding child support and/or alimony, then the member, if he desires to comply with the court order, must do so voluntarily by allotment or otherwise.

If The court order calls for a division of property (other than retired or retainer pay) in addition to a division of retired or retainer pay, a garnishment action can be commenced to enforce collection of such other property obligations. The total amount payable under both this provision and a provision dividing disposable retired/retainer pay cannot exceed 50% of such pay. Orders to enforce a division of property (other than retired or retainer pay) are restricted to a maximum of 25% of disposable retired or retainer pay.

In cases where there is both a division of disposable retired or retainer pay and a garnishment (under 42 U.S.C, Section 659 et. seq.) to enforce collection of child support and/or alimony, the total amount payable cannot exceed 65% of such pay. The following procedures should be observed in applying for direct payments under the the Act:

1. A completed application (DD Form 2293) signed by the former spouse and/or a written request to enforce the pertinent court order(s), together with a certified copy of the final court order (see item #5 below) should be served either personally or by certified or registered mail, return receipt requested, upon the:

Defense Finance and Accounting Service
Cleveland Center, Code LF - Room 1417
Garnishment Operations Directorate
P. O. Box 998002
Cleveland, Ohio 44199-8002

2. The application should specifically state what court orders (e.g. - child support, alimony and/or division of military retired pay) are sought to be enforced under the Act. If a request is silent as to the type of order(s) sought to be

enforced, then only orders dividing military retired pay will be reviewed.

3. The member should be identified by full name and social security number and any other available identifying information (such as the branch of military service with which he/she is associated).

4. The full name, address, and social security number of the former spouse applying for direct payment must be provided.

5. The final decree of divorce, legal separation or annulment must have been authenticated or certified by the court within 90 days immediately preceding its service on this Directorate. (A certified copy is required, certified by the clerk of courts. Certification by a notary public is not sufficient. The clerk of courts must provide the exact date he makes that certification).

6. When a property division is involved, the order itself or an accompanying court document should show that the court had competent jurisdiction as referred to above and that the member's rights under the Soldiers and Sailors Civil Relief Act were observed.

7. The order should specifically provide for payment of an amount expressed in dollars or as a percentage or fraction of disposable retired or retainer pay. However, for orders dividing military retired or retainer pay as property which are served on or after April 1, 1995, the order may provide for the payment of an amount expressed in terms of a formula (if the only element missing is the member's years of service) or may provide for the payment of an amount expressed in terms of a hypothetical retired pay amount. For formula and hypothetical awards, the parties must have been divorced while the member was on active duty. Under certain circumstances, court orders which express the division of retired pay in terms of a hypothetical or formula may be accepted by this Center. Only court orders issued while the member was on active duty and served on this Center after April 1, 1995 qualify for consideration. Where the pertinent court order is expressed in terms of a formula and the element missing from that formula is the member's years of service, this Center will supply the member's years of service in terms of whole months. Court orders expressing a division of retired pay in terms of a hypothetical amount will be computed on the basis of the member's retired pay at the time of retirement. See 32 CFR Part 63.6.

8. A statement must be provided that the court order has not been amended, superseded or set aside.

9. - The order must be a final decree from which no appeal may be taken or from which no appeal had been taken within the time allowed for appeals.

10. Evidence must be provided, unless so set forth in the order, that the former spouse was married to the member for at least 10 years during which the member performed at least 10 years creditable service, where the application is based on a court order dividing retired or retainer pay as property. Such evidence should consist of a copy of the marriage certificate, if the date of marriage is not contained in the court order provided.

11. If the application includes a request for child support, a copy of a birth certificate should be submitted unless the pertinent court order provides the child's date of birth.

Payments to the former spouse will begin 90 days after the date of effective service of a complete application, provided all requirements under the Act and the regulations have been satisfied. All applicants will be notified in writing as to whether their application will be honored or denied. If an application is denied, then the former spouse or her attorney will be notified as to what additional requirements must be satisfied before the application can be properly honored.

Court orders awarding a division of retired pay as property that were issued prior to June 26, 1981, can be honored, if they otherwise satisfy the requirements and conditions specified in the Act. However, amendments issued after June 25, 1981, to court orders issued prior to June 26, 1981 (which were silent as to providing for a division of the member's retirement pay), to subsequently provide for a division of retired pay as property are not enforceable under the Act. Court orders awarding a division of retired pay as property issued on or after June 26, 1981, of course, may also be enforced.

Regardless of the language contained in the court order, an award of a percentage of a member's retired pay is construed under the Act as a percentage of "disposable" retired pay. Disposable retired pay is the member's gross pay entitlement minus deductions required by law to be withheld.

B. BENEFITS FOR DEPENDENTS WHO ARE VICTIMS OF ABUSE BY MEMBERS LOSING RIGHT TO RETIRED PAY

Section 1408(h) of the Act provides benefits to spouses and former spouses of members who, as a result of the abuse of dependents, lose the right to retired pay after becoming retirement eligible. A spouse or former spouse may enforce a court-ordered division of retired pay as property under this

Section, if all of the other requirements of Section 1408 are satisfied.

C. COURT-ORDERED CHILD SUPPORT AND/OR ALIMONY

Court orders providing for current child support and/or current alimony can be honored under the Act without the necessity of procuring a garnishment order, provided that all of the requirements and conditions specified in the Act and regulations are satisfied. All of the above enumerated procedures must be observed with the exception of the 10/10 requirement, and the specific rules on jurisdiction set forth in the Act. Child support and/or alimony arrearages cannot be collected under the Act, and therefore, a garnishment action under Title 42, United States Code, Section 659, must be used.

D. MEDICAL, COMMISSARY, AND EXCHANGE PRIVILEGES

Under title 10 United States Code, Section 1072(2), an unremarried former spouse who had been married to the member or former member for at least 20 years during which the member or former member performed at least 20 years of credible military service, may be eligible for medical benefits, commissary and exchange privileges. Effective January 1, 1985, an unremarried former spouse who was divorced prior to April 1, 1985, and who was married to the member or former member for at least 20 years, 15 of which were during the period of the member's or former member's creditable service may be entitled to medical benefits, only. In addition, there would be limited medical benefits for those unremarried former spouses whose divorces were finalized after April 1, 1985. Former spouses should contact the following agencies (depending upon the military service involved) at the address noted for more information:

AIR FORCE - Room A 106
Randolph AFB, TX 78233-6636
1-800-531-7502

NAVY - Bureau of Naval Personnel (Code 334)
Washington, DC 20370-5334
1-800-443-9297

MARINE CORPS - Commandant of The Marine Corps
Code MI-IP-20
Headquarters U.S. Marine Corps
Washington, DC 20380-0001
1-800-336-4649

- ARMY - HQTD (TAPC-PDO-IP)
Hoffman Bldg. 2, Room 3 S49
200 Stovall Street
Alexandria, VA 22332-0407
(703) 325-9590

E. SURVIVOR BENEFIT PLAN (SBP) COVERAGE

The Uniformed Services Former Spouses' Protection Act, Public Law 97-252, Section 1003, authorized but limited the ability to provide Survivor Benefit Plan (SBP) coverage for a former spouse to those cases in which the service member retired on or after September 8, 1982 (10 United States Code, Section 1447). The Department of Defense Authorization Act of 1984 (Public Law 98-94), approved on September 24, 1983, however, further amended the SBP Law as it relates to former spouses. Under the amendment, a member may elect "former spouse" SBP coverage for an individual who was originally a spouse beneficiary under SBP provided that the parties were divorced after eligibility to retired/retainer pay. The Department of Defense Authorization Act of 1985 (Public 98-525), approved October 19, 1984, added another amendment to the SBP law concerning former spouse protection. Under certain conditions, the amendment allows a former spouse to initiate SBP coverage on her behalf if the service member fails or refuses to honor a court-ratified agreement to make the election. Section 1447, as amended, delineates both the substantive and procedural requirements for establishing SBP coverage for a former spouse. The Defense Finance and Accounting Service - Cleveland Center, Retired Pay Office, Code ROA, P.O. Box 99199, Cleveland, Ohio 44199-9199, reviews all former spouse SBP applications. Questions concerning the requirements should be directed to that office. Their customer service number is (216) 522-5770.

F. If you have further questions, you may contact Garnishment Operations Directorate at (216) 522-5301.

APPLICATION FOR FORMER SPOUSE PAYMENTS FROM RETIRED PAY

(Please read instructions on reverse before completing this form.)

Form Approved
OMB No. 0704-0182
Expires Jan 31, 1994

FOR OFFICIAL USE

Public reporting burden for this collection of information is estimated to average 1.2 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0182), Washington, DC 20503. PLEASE **DO NOT RETURN YOUR FORM TO EITHER OF THESE ADDRESSES. SEND COMPLETED FORM TO THE APPROPRIATE SERVICE ADDRESS LISTED ON BACK.**

PRIVACY ACT STATEMENT**AUTHORITY:** Title 10 USC § 1408; EO 9397.**PRINCIPAL PURPOSE(S):** To request direct payment through a Uniformed Service designated agent of court ordered child support, alimony, or division of property to a former spouse from the retired pay of a Uniformed Service member.**ROUTINE USE(S):** Information provided will be disclosed to the retired member for verification and comment. Additionally, it may be disclosed to state social service agencies for human services benefit entitlement purposes; to the Internal Revenue Service, and state and local taxing authorities for income tax purposes.**DISCLOSURE:** Voluntary; however, failure to provide requested information may delay or make impossible processing this direct payment request.**1. APPLICANT IDENTIFICATION**

a. NAME (As appears on court order) (Last, First, Middle Initial)

b. CURRENT NAME (Last, First, Middle Initial)

c. SOCIAL SECURITY NUMBER

d. ADDRESS (Street, City, State, Zip Code)

2. SERVICE MEMBER IDENTIFICATION

a. NAME (Last, First, Middle Initial)

b. SOCIAL SECURITY NUMBER

c. BRANCH OF SERVICE

d. ADDRESS (Street, City, State, Zip Code) (if known)

3. REQUEST STATEMENT

I request direct payment from the retired pay of the above named Uniformed Service member based on the enclosed court order:

I request payment of:

- Child support in the amount of \$ _____ per month.
- Alimony, spousal support or maintenance in the amount of \$ _____,
or _____ percent of disposable retired pay per month.
- A division of property in the amount of \$ _____,
or _____ percent of disposable retired pay per month.

I certify that any request for current child and/or spousal support is not being collected under any other wage withholding or garnishment procedure authorized by statute. Furthermore, I certify that the court order has not been amended superseded or set aside and is not subject to appeal. As a condition precedent to payment, I agree to refund all overpayments and that they are otherwise recoverable and subject to involuntary collection from me or my estate, and I will notify the Uniformed Service if the operative court order, upon which payment is based, is vacated, modified, or set aside. I also agree to notify the Uniformed Service of a change in eligibility for payments. This includes notice of my remarriage, if under the terms of the court order or the laws of the jurisdiction where it was issued, remarriage causes the payments to be reduced or terminated; or notice of a change in eligibility for child support payments by reason of the death, emancipation, adoption, or attainment of majority of a child whose support is provided through direct payments from retired pay. I hereby acknowledge that any payment to me cannot lawfully exceed 50 percent of the member's disposable retired pay which is gross retired pay minus deductions such as those authorized or required for income tax, Federal indebtedness, or disability reasons; that my payments may not exceed any lesser amount or percentage specified by court order; and that any court-ordered percentage must be construed as a percentage of disposable retired pay.

4. I HAVE ENCLOSED ALL PERTINENT DOCUMENTATION TO INCLUDE: (X as applicable)											
a.	A certified, original copy made within 90 days preceding this application for payment of the operative court order and other certified accompanying documents that provide for payment of child support, alimony or a division of retired pay as property.										
b.	Evidence of the date(s) of my marriage to the member if the application is for the direct payment of a division of the member's disposable retired pay as property. Give MARRIAGE DATE (YYMMDD) in this block unless stated in court order.										
c.	If payment request includes child support, give name(s) and birth date(s) of child(ren):										
	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <th style="width: 70%; text-align: center; padding: 5px;">(1) Name of Child (Last, First, Middle Initial)</th> <th style="width: 30%; text-align: center; padding: 5px;">(2) Date of Birth (YYMMDD)</th> </tr> <tr><td style="height: 25px;"></td><td></td></tr> <tr><td style="height: 25px;"></td><td></td></tr> <tr><td style="height: 25px;"></td><td></td></tr> <tr><td style="height: 25px;"></td><td></td></tr> </table>	(1) Name of Child (Last, First, Middle Initial)	(2) Date of Birth (YYMMDD)								
(1) Name of Child (Last, First, Middle Initial)	(2) Date of Birth (YYMMDD)										
d.	Other information (<i>please identify</i>) or remarks.										
5a. APPLICANT'S SIGNATURE	b. DATE SIGNED										

INSTRUCTIONS FOR COMPLETION OF DD FORM 2293

GENERAL. These instructions govern an application for direct payment from retired pay of a Uniformed Service member in response to court ordered child support, alimony, or a division of property, under the authority of 10 USC § 1408.

SERVICE OF APPLICATION. You must serve the application by certified or registered mail with return receipt requested or by personal service delivered to the appropriate Uniformed Service designated agent. The Uniformed Services' designated agents are:

- (1) **ARMY:** Director, DFAS - Cleveland Center (Code L), PO Box 998002, Cleveland, OH 44199-8002;
- (2) **NAVY:** Director, DFAS - Cleveland Center (Code L), PO Box 998002, Cleveland, OH 44199-8002;
- (3) **AIR FORCE:** Director, DFAS - Cleveland Center (Code L), PO Box 998002, Cleveland, OH 44199-8002;
- (4) **MARINE CORPS:** Director, DFAS - Cleveland Center (Code L), PO Box 998002, Cleveland, OH 44199-8002;
- (5) **COAST GUARD:** Commanding Officer (LGL), United States Coast Guard, Pay and Personnel Center, 444 S.E. Quincy Street, Topeka, KS 66683-3591;
- (6) **PUBLIC HEALTH SERVICE:** Office of General Counsel, Department of Health and Human Services, Room 722A, Humphrey Building, 200 Independence Avenue S.W., Washington, DC 20201;
- (7) **NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION:** Same as U.S. Coast Guard.

IMPORTANT NOTE. Making a false statement or claim against the United States Government is punishable. The penalty for willfully making a false claim or false statement is a maximum fine of \$10,000 or maximum imprisonment of 5 years or both (18 USC § 287 and 1001).

- ITEM 1.** (a) Enter full name as it appears on the court order;
 (b) Enter current name if different than it appears on court order;
 (c) Enter Social Security Number;
 (d) Enter current address.

- ITEM 2.** (a) Enter former spouse's full name as it appears on the court order;
 (b) Enter former spouse's Social Security Number;
 (c) Enter former spouse's branch of service;
 (d) Enter former spouse's current address, if known.

ITEM 3. Read the Request Statement carefully.

ITEM 4. A certified copy of a court order can be obtained from the court that issued the court order. Other documents include, but are not limited to, final divorce decree, property settlement order, and any appellate court orders. If the court order does not state that the former spouse was married to the member for ten years or more while the member performed ten years creditable service and the request is for payment of a division of property, the applicant must provide evidence to substantiate the ten years' marriage condition. Additional evidence must show that the ten years' requirement has been met, including: Uniformed Service orders, marriage certificate, and other documents that establish the period of marriage. Other information or documents included with the request should be clearly identified by the document's title and date. Remarks may be provided to clarify specific points.

ITEM 5. Self-explanatory.

APPENDIX H

U.S. Department
of Transportation

United States
Coast Guard

Application Information for Direct Payments under UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

1. Complete the enclosed application form, CG PPC-2293. DD Form 2293 issued by the Department of Defense is also acceptable.
2. Enclose a certified copy of your final decree of divorce, dissolution, annulment, or legal separation. It is required that the court order be authenticated or certified within 90 days immediately preceding its service on the Coast Guard. It must furthermore be issued by a court that had jurisdiction over your former spouse by virtue of his or her residence within the territorial jurisdiction of the court for purposes other than military assignment, or his or her domicile within the territorial jurisdiction of the court, or his or her consent to the court's exercise of jurisdiction over him.
3. Enclose a certified copy of the court order - if not included in your divorce, dissolution, annulment or separation decree - directing that you receive a specific percentage or dollar amount of your former spouses' retired pay. This may be in the form of a court ordered, ratified or approved property settlement incident to such final decree.
4. Provide sufficient identifying information about your former spouse to permit processing of your request including his or her full name and social security number. Additional identifying information may be included in block 4e of the application form (CG PPC-2293).
5. If the court order does not specify that you were married to your former spouse for ten years during the course of which he or she performed ten years of service creditable in determining eligibility for retired pay, you must provide sufficient evidence for the Coast Guard to verify that this requirement has been met.
6. If the court order was issued while your former spouse was on active duty and he or she was not represented in court, the court order must specify or be accompanied by documents that certify that the former spouse's rights under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. Appendix 501-591, were met.
7. This material must be sent by certified or registered mail, return receipt requested, to:

COMMANDING OFFICER (LGL)
COAST GUARD PAY AND PERSONNEL CENTER
444 SE QUINCY ST
TOPEKA KS 66683-3591

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PRIVACY ACT STATEMENT

Authority: Title 10 U.S. Code Section 1408; EO 9397, November 1943 (SSN).
Principal Purpose: To request direct payment from the Coast Guard or NOAA Corps of court ordered child support, alimony, or division of property for a former spouse from the retired pay of a Coast Guard or NOAA member.
Routine Uses: Information provided will be disclosed to the retired member for verification and comments. It may be disclosed to state social services agencies for benefit entitlement purposes; and to the Internal Revenue Service and state and local taxing authorities for tax purposes.
Disclosure: Voluntary; however, failure to provide requested information may delay or make impossible the processing of this request.

1. Applicant Identification		2. Service Member Identification	
a. Name		a. Name	
b. Social Security Number	b. Branch of Service	c. SSN	
c. Postal address		c. Postal address (if known)	

3. REQUEST STATEMENT

I request direct payment from the retired pay of the above named Coast Guard or NOAA Corps member based on the enclosed court order, as follows:

☐ Child support in the amount of \$ _____ per month.

☐ Alimony, spousal support or maintenance in the amount of \$ _____
or _____ per cent of disposable retired pay.

☐ A division of property in the amount of \$ _____ or
_____ per cent of disposable retired pay.

I certify that my request for child support and/or alimony is not being collected by any other statutory withholding or garnishment procedures. I further certify that the enclosed court order has not been superseded or set aside and is not under appeal.

In consideration for the direct payments that I am to receive from a Coast Guard or NOAA retired pay account under the Uniformed Services Former Spouses' Protection Act (FSPA), I hereby agree: (1) To voluntarily reimburse the Coast Guard for any future overpayments that I receive from the retired pay account involved; (2) to allow the Coast Guard to collect any overpayment from me or my estate if I fail to provide reimbursement on my own accord; and (3) to promptly notify the Coast Guard if the court order submitted on my behalf to obtain direct payments is vacated, modified, or set aside. This shall include notice of my remarriage if all or a part of the payment is for alimony or notice of a change in eligibility for child support payments under circumstances of the death, emancipation, adoption, or attainment of majority of a child whose support is provided through direct payment to me from retired pay.

4. I have enclosed all pertinent documentation to include: (X as applicable)															
	a. A certified copy of my final decree of divorce, dissolution, annulment, or legal separation. The divorce decree must be authenticated or certified by a court official within 90 days preceding this application.														
	b. A certified copy of the court order - if not included in my divorce, dissolution, annulment, or separation decree - directing that I receive a specific percentage or dollar amount of child support, alimony, or as a division retired pay as marital property. This court order must also be authenticated or certified by a court official within 90 days preceding this application.														
	c. Evidence of the date(s) of my marriage to the member if not included in enclosed court orders. (Required only if direct payment is based on a division of the member's disposable retired pay as marital property.)														
	d. If payment request includes child support, give name(s) and birth date(s) of children:														
	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <th style="width: 70%; padding: 5px;">(1) Name of Child (Last, First, Middle Initial)</th> <th style="width: 30%; padding: 5px;">(2) Date of Birth</th> </tr> <tr><td style="height: 20px;"></td><td></td></tr> <tr><td style="height: 20px;"></td><td></td></tr> <tr><td style="height: 20px;"></td><td></td></tr> <tr><td style="height: 20px;"></td><td></td></tr> <tr><td style="height: 20px;"></td><td></td></tr> <tr><td style="height: 20px;"></td><td></td></tr> </table>	(1) Name of Child (Last, First, Middle Initial)	(2) Date of Birth												
(1) Name of Child (Last, First, Middle Initial)	(2) Date of Birth														
	e. Other information (please identify) or remarks.														
	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 70%; padding: 5px; vertical-align: top;">Applicant's Signature</td> <td style="width: 30%; padding: 5px; vertical-align: top;">Date Signed</td> </tr> <tr> <td style="height: 50px;"></td> <td></td> </tr> </table>	Applicant's Signature	Date Signed												
Applicant's Signature	Date Signed														
<p>SERVICE OF APPLICATION. The application must be served by certified or registered mail with return receipt requested or by personal service delivered to the designated agent of the Coast Guard and NOAA Corps, as follows:</p> <p style="text-align: center;"> COMMANDING OFFICER (LGL) COAST GUARD PAY AND PERSONNEL CTR 444 SE QUINCY ST TOPEKA KS 66683-3591 </p>															
<p>IMPORTANT NOTE. Making a false statement or claim against the U.S. Government is punishable. The penalty for willfully making a false claim or false statement is a maximum fine of \$10,000 or maximum imprisonment of 5 years or both (18 U.S.C. 287 and 1001).</p>															

APPENDIX I

CONTINUED HEALTH CARE BENEFIT PROGRAM ADDENDUM for the Office of the Assistant Secretary of Defense (Health Affairs)

AGENCY DISCLOSURE NOTICE

Public reporting for this collection of information is estimated to average 15 minutes per application, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, Virginia 22202-4302, and the Office of Management and Budget, Paperwork Reduction project (0704-0364), Washington, DC 20503. PLEASE DO NOT RETURN YOUR APPLICATION TO EITHER OF THESE ADDRESSES. SEND YOUR COMPLETED QUESTIONNAIRE TO THE ADDRESS LISTED ON THE BOTTOM RIGHT PORTION OF THE APPLICATION.

PRIVACY ACT STATEMENT

- AUTHORITY:** 10 U.S.C. 1086 and E.O. 9397
- PRINCIPLE USES(S):** This form is used by former armed services members to apply for coverage under the Continued Health Care Benefit Program.
- ROUTINE USE(S):** Disclosure may be made to Federal, state, local, foreign government agencies, private business entities and individual providers of care on matters relating to entitlement, fraud, program abuse, program integrity, or civil and criminal litigation related to the operation of the Continued Health Care Benefit Program.
- DISCLOSURE:** Voluntary; however failure to furnish requested information will result in the applicant not being enrolled in the Continued Health Care Benefit Program.

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1. Applicant's name _____
 (Title) (First) (Middle) (Last) (Area Code and Phone No.)

2. Residence address _____
(No. and Street and Apt. No.) (City and State) (Zip Code)

3. Address where policy will be delivered _____
(No. and Street and Apt. No.) (City and State) (Zip Code)

4a. If service member, date of entry on active duty _____

4b. If eligibility is created by termination of military benefits, check reason and show date such benefits end:

- ☐ Separation from active duty. Date MFT/CHAMPUS benefits end _____
- ☐ Divorce. Date CHAMPUS benefits end _____
- ☐ No longer a dependent child. Date benefits end _____
- ☐ Unremarried former spouse. Date benefits end _____
- ☐ Unremarried former spouse drawing annuity/retainer pay. Date benefits end _____

5. Service sponsor through whom you qualify _____ (Name) _____ (Social Security No.)

6. Complete the following for each person (including yourself) to be covered.

Complete the following for each person (including yourself) to be covered.					
Name	Social Security Number	Age	Date of Birth (Mo./Day/Yr.)	Sex (M/F)	Full-time Student? (Y/N)
Applicant:					
Spouse:					
Child:*					
Child:					
Child:					

*Children age 21 (23 if a full-time student) losing military coverage must apply separately for their own certificate at adult premiums. If more than three children, use separate sheet of paper.

7. Individual Three-Month Premium is \$410.00 Family Three-Month Premium is \$891.00

Total Three-Month Premium Enclosed: \$ _____ Premium paid is for: ☐ Individual coverage ☐ Family coverage.
Other than a few exceptions, this program does not allow for refunds after health care coverage begins

8. Do you or any covered dependents currently have other insurance? ☐ Yes ☐ No _____ (Name of Carrier)

9. If you are currently enrolled in a DoD Managed Care Program (MCP), such as Tri-Care or USTF, you must be disenrolled from the MCP to allow enrollment in the CHCBP. Please indicate your approval for disenrollment by CHCBP by signing below:

Dated at _____, on _____, 19_____. _____
(City, State) (Month, Day) (Year) (Signature of Applicant)

Mail this application along with a check or Money Order payable to United States Treasury to:

CHCBP Administrator
P.O. Box 1608
Rockville, MD 20849-1608

CHCBP Toll Free Number:
1-800-809-6119

Premium payment must accompany application. Paid by: ☐ Check ☐ Money Order (make check/M.O. payable to **United States Treasury**)

Dated at _____, on _____, 19_____. _____
(City, State) (Month, Day) (Year) (Signature of Applicant)

Have you: ☐ Checked all appropriate boxes and signed the application? ☐ Included premium payment? ☐ Included proof of eligibility?

A summary of the rules pertaining to the Department of Defense's Continued Health Care Benefit Program (CHCBP) coverage.

What is CHCBP?

- Implementation of the CHCBP was directed by Congress in section 4408 of the National Defense Authorization Act for Fiscal Year 1993. This law directed the implementation of a program of temporary continued health benefits coverage comparable to the benefits provided for former civilian employees of the Federal government. The CHCBP is a premium based temporary health care coverage program that will be available to qualified beneficiaries. Medical benefits under this program will mirror the benefits offered via the basic CHAMPUS program. The CHCBP is not part of the CHAMPUS program; however, it functions under most of the rules and procedures of CHAMPUS.

How long does CHCBP coverage last?

- For any member discharged or released from active duty or full-time National Guard duty, whether voluntarily or involuntarily, coverage under the CHCBP is limited to eighteen (18) months.
- For an unmarried dependent child of a member or former member, coverage under the CHCBP is limited to thirty-six (36) months.

Who is eligible?

A person who:

- is discharged or released from active duty, whether voluntarily or involuntarily, under other than adverse conditions, and was entitled to medical and dental care under a military health care plan; and
- is not eligible for any benefits under CHAMPUS or TAMP.

A person who:

- ceases to meet requirements for being considered an unmarried dependent child of a member or former member of the Uniformed Services;
- on the day before ceasing to meet those requirements, was covered under CHAMPUS or TAMP as a dependent of the member or former member; and
- would not otherwise be eligible for any benefits under CHAMPUS.

A person who:

- is an unremarried former spouse of a member or former member of the Uniformed Services;
- on the day before the date of the final decree of divorce, dissolution, or annulment was covered under a health benefits plan under CHAMPUS or TAMP as a dependent of the member or former member; and
- is not eligible for CHAMPUS as a former spouse of a member or former member.

Enrollment

- In order to enroll in the CHCBP, an eligible individual must request enrollment via an application or letter to:

CHCBP Administrator
P.O. Box 1608
Rockville, MD 20849-1608

- Although beneficiaries have sixty (60) days to enroll in the CHCBP, the period of coverage must begin on the day after entitlement to a military health care plan ends (including transitional health care under TAMP).
- The application must also include payment for the premium for the first quarter (three months) coverage under the CHCBP.
- Applications must be accompanied by proof of eligibility such as DD 214, Defense Enrollment Eligibility Reporting System (DEERS) or any other official statement of service, and/or proof of dependency status.

What does CHCBP cost?

- Premium rates are established by the Assistant Secretary of Defense (Health Affairs) for two rate groups, individual and family. The rates are based on Federal Employee Health Benefit Program employee and agency contributions which would be required for a comparable health benefits plan plus an administrative fee. The premium rates may be updated annually and will be published when updated. The rates are also available from CHCBP Administrator.
- Members discharged or released from active duty or full-time National Guard duty must select their rate group at the time they enroll, either individual or family. After enrollment, beneficiaries may change from family to individual at any time by notifying CHCBP Administrator in writing. Changes from individual to family may not be made.
- Premiums are to be paid quarterly by check or money order. Payment must be received no later than thirty (30) days after the start of the quarter.

Additional Information

- Write or call:

CHCBP Administrator
P.O. Box 1608
Rockville, MD 20849-1608
1-800-809-6119

APPENDIX J

SAMPLE MILITARY PENSION DIVISION ORDER

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO. _____

Plaintiff
v.
Defendant

MILITARY PENSION DIVISION ORDER

THIS CAUSE came before the undersigned judge upon the Plaintiff's claim for distribution of the Defendant's military retirement benefits. The parties, having resolved this matter, agree to the entry of the following military pension division order to assign to Plaintiff a portion of those benefits. The court makes the following:

FINDINGS OF FACT

1. Plaintiff is a resident of _____ County, State of _____.
2. Defendant is a resident of _____ County, State of _____.
3. The parties were married on _____ [date] and were divorced in _____ County, State of _____ on the ____ day of _____, 19__.
4. The Court has both personal and subject matter jurisdiction to enter a military pension division order in this matter pursuant to 10 U.S.C. § 1408, and [insert appropriate state statute]. Specifically, its jurisdiction to divide military retired pay is based on [insert one of the following:] [domicile of the military member in this state], [residence other than because of military assignment], or [consent] per 10 U.S.C. § 1408 (c)(4).
5. Defendant agrees to provide any of the items below to the Plaintiff at her/his request and to provide any information that she/he is unable to obtain in order to have this order honored for direct payment of military pension benefits.

a. A copy of this court decree dividing his/her retired pay, certified within ninety (90) days immediately preceding its service on the Defense Finance and Accounting Service (DFAS).

b. A statement of the Plaintiff which verifies that the decree has not been modified, superseded or set aside.

c. The parties' marriage certificate.

d. The Defendant's current address.

6. Pursuant to state and federal law, Plaintiff is entitled to a share of the Defendant's military retirement benefits, which share is described hereafter. Defendant is in military service and is eligible for retired pay in accordance with applicable federal law.

7. The Defendant assigns to the Plaintiff a portion of his military retired pay. The Plaintiff is entitled to a direct payment in the amount specified in Paragraph 1 of the Decree below from DFAS from the Defendant's disposable retired pay. The Plaintiff shall receive payments at the same time as the Defendant.

8. The Defendant's military retired pay constitutes marital property to the extent it is based on active duty service performed between the date of marriage and the date the parties separated. Plaintiff's share shall be as set forth in Paragraph 1 of the Decree below. The Plaintiff should receive the same percent of all cost-of-living adjustments which the Defendant receives after his retirement.

9. The plaintiff's entitlement to her/his portion of retired pay accrues only upon the Defendant's retirement and shall cease at the death of either party. The Plaintiff agrees that any future overpayments to her/him are recoverable and subject to involuntary collection from her/him or her/his estate. The Plaintiff agrees further to notify DFAS about any changes in this agreement or the order affecting these provisions of it, or in the eligibility of any recipient receiving benefits pursuant to it.

10. The parties intend that this order qualify for direct payment of military pension benefits to the Plaintiff under the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408 et seq. All provisions hereof shall be interpreted liberally so as to make this order qualify.

11. The Plaintiff and the Defendant stipulate that the following information is correct:

- a. Defendant's address is _____.
- b. Defendant's Social Security Number is _____;
- c. Defendant's date of birth is _____.
- d. Defendant's military service is with the United States _____;
[branch of service]
- e. Defendant entered military service on _____ [and is still on active
duty in the grade of _____]; [date]
- f. Plaintiff's address is _____; and
- g. Plaintiff's Social Security Number is _____.

12. Defendant agrees to cooperate with Plaintiff in executing an application for direct payment to Plaintiff from Defendant's retired pay pursuant to 10 U.S.C. § 1408, and he/she agrees to execute all documents that DFAS may require for direct payments to Plaintiff.

13. Defendant's rights under the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. §§ 501-548 and 560-591, have been observed and honored.

14. This court is a "court of competent jurisdiction" under 10 U.S.C. § 1408(a)(1). This order bears the certification of said country's Clerk of Superior Court and has not been amended, superseded, or set aside by any subsequent order.

15. It is intended that the Plaintiff shall receive her/his full share of Defendant's retirement, calculated as set out below and without reduction for V.A. disability pay, Dual Compensation Act income, or any other reason.

16. The parties were married for a period of more than ten years during which time Defendant performed more than ten years of creditable military service. The parties were married during the Defendant's creditable military service from _____ to _____.

17. The Plaintiff is eligible for coverage as the beneficiary of Defendant's Survivor Benefit Plan, as set forth below.

18. The terms of this order are fair, reasonable, adequate and necessary.

19. The parties have knowingly and voluntarily consented to this order.

20. The parties are entitled to the relief granted below.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the subject matter of this action and the parties hereto.

2. Plaintiff is entitled to an assignment of Defendant's United States military retirement benefits as set forth herein, subject to the conditions set forth in the DECREE below.

3. The facts above are incorporated herein by reference to the extent that they represent conclusions of law.

4. The terms of this order are fair, reasonable, adequate and necessary.

5. The parties have knowingly and voluntarily consented to this order.

6. The parties are entitled to the relief granted below.

DECREE

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1. Plaintiff is granted an assignment of a part of Defendant's military retirement benefits. The Plaintiff shall receive a percentage of the Defendant's monthly disposable retired pay (as the term "disposable retired pay" is defined below) using the following formula:

$$1/2 \times A/B \times C$$

"A" equals _____ months, which is the number of months that the marriage coincided with military service creditable for retired pay purposes. "B" equals _____ months, which the parties have agreed will be used as the length of service at retirement. "C" equals the Defendant's disposable retired pay. The term "disposable" is defined in 10 U.S.C. § 1408. The term "retired pay" is defined as \$_____, which is what the Defendant would have received as a _____ [grade/rank] with _____ years in service, which was his service time and grade at the date of separation (divorce).

2. Plaintiff shall receive the same percent of all cost-of-living adjustments which Defendant receives after his retirement.

3. Plaintiff shall begin to receive the above-stated amount of Defendant's retirement benefits at the time Defendant's military retirement benefit payments begin. Plaintiff's entitlement to her portion of retired pay accrues only upon the Defendant's retirement and shall end at the death of either party.

4. When DFAS has determined that this order meets the requirements of the applicable federal law and is acceptable as a direct-pay military pension division order, then it shall carry out the provisions of this order. DFAS shall give written notice to Plaintiff at her address contained in this order and to her counsel, _____ [attorney's name], located at _____ [attorney's address], that this order will be honored as a direct-pay military pension division order.

5. If Plaintiff moves from her current address, she shall promptly notify DFAS in writing or her new address.

6. If Defendant receives V.A. disability pay or obtains federal employment, and this event causes a reduction of Defendant's disposable retired pay, Defendant will pay to Plaintiff directly the full monthly amount provided herein or any portion thereof that is not paid directly to her.

7. The monthly payments herein shall be paid to Plaintiff regardless of her marital status and shall not end at remarriage.

8. This court retains jurisdiction over this matter to amend this order to cause it to meet the definition of a military pension division order pursuant to 10 U.S.C. § 1408.

9. The Defendant agrees to, and shall, elect to make the Plaintiff the sole primary beneficiary of the Survivor Benefit Plan (SBP). [Add if appropriate:] (within sixty (60) days of the date of the filing of this order and to provide a copy of said election to the Plaintiff.) Defendant shall elect the spouse-only portion and shall select as the base amount the full amount of monthly retired pay. If Defendant fails to make said election, an amount equal to the present value of SBP coverage for the Plaintiff shall, at the death of Defendant, become an obligation of his estate. In addition, the Plaintiff shall be entitled to such remedies for breach as are available to her in a court of law.

This the _____ day of _____, 199____.

District Court Judge Presiding

WE CONSENT:

[INSERT PARTIES' AND ATTORNEYS' SIGNATURE BLOCKS]

APPENDIX K
INFORMATION PAPER

DAJA-LA
22 August 1995

SUBJECT: Division of Retired Pay Pursuant to the Uniformed Services Former Spouses' Protection Act

1. PURPOSE: To provide information on recent developments in the division of retired military pay.

2. FACTS:

a. Public Law 97-252 was enacted on 8 Sep 82, effective 1 Feb 83, and amended on 19 Oct 84, by Public Law 98-525 and 5 Nov 90, by Public Law 101-510. This Law is cited as the "Uniformed Services Former Spouses' Protection Act" (the Act) and has been codified as Title 10, United States Code, Section 1408.

b. The Act recognizes the right of state courts to order the distribution of military retirement or retainer pay to a spouse or former spouse (hereinafter "spouse") incident to a final decree of divorce, dissolution, annulment, or separation, and provides a method for enforcement of these orders. Disability retired pay cannot be divided under the Act. However, with respect to court orders issued on or after 14 Nov 86, it is possible to enforce an order dividing military retired pay against that portion of a soldier's pay which is not based upon disability. The Act also provides a means for the spouse to enforce current alimony or child support through payments to the spouse directly from a member's retired or retained pay account.

c. While courts may award a portion of a soldier's retired or retainer pay to a spouse married for a shorter period, enforcement of a court order dividing retired or retainer pay as property of the parties under the Act is limited to those cases where the parties were married to each other for at least 10 years during which the soldier performed at least 10 years of creditable military service. Also, an order cannot be honored by the Department of Defense unless the court issuing the order had jurisdiction over the soldier by reason of (1) residence in the territorial jurisdiction of the court (other than because of military assignment), (2) domicile in the territorial jurisdiction of the court, or (3) consent to the jurisdiction of the court. These requirements are not applicable to requests for enforcement of current alimony or child support payments.

d. Regardless of the type of order sought to be enforced, including orders for payment of alimony and child support, the rights of the soldier under the Soldiers' and Sailors' Civil Relief Act of 1940 (SSCRA) must have been observed during the state court proceedings.

e. Only a spouse may make application under the Act. If the spouse does not choose to apply for enforcement of an order dividing military retired pay, the soldier cannot do so.

If the soldier desires to comply with the court order, the soldier must do so voluntarily by allotment or another method.

f. The following procedures should be observed in applying for direct payments under the Act:

(1) The spouse must sign a completed application (DD Form 2293) or written request to enforce the pertinent court order and serve it, together with a copy of the final court order, personally or by certified or registered mail, upon:

DFAS-Cleveland Center
Code LF-Room 1417
Garnishment Operations Directorate
P.O. Box 998002
Cleveland, OH 44199-8002

(2) The application should state what award in the court order is sought to be enforced under the Act (i.e., child support, alimony, and/or division of retired pay). If the spouse is seeking to enforce more than one claim, she should identify the priority in which they are to be paid should there not be sufficient funds to pay all of them. Otherwise, DFAS will apply a default priority and pay the full amount of the retired pay claim first, the child support claim second, and the alimony claim last.

(3) The soldier should be identified by full name, social security number, and other identifying information (e.g., branch of service).

(4) The spouse applying for direct payment must provide his/her full name, address and social security number.

(5) The final decree must have been authenticated or certified by the court within 90 days preceding service on DFAS-Cleveland. The clerk of court must provide the date of certification. The applicant must also provide certified copies of all amendments or other documents pertinent to the final decree, such as an incorporated separation agreement.

(6) The order or accompanying court document should show the court had competent jurisdiction and that the soldier's rights under the SSCRA were observed. Failure to observe SSCRA rights is a common reason for DFAS' rejection of applications.

(7) A statement must be provided that the court order has not been amended, superseded or set aside. This requirement is satisfied when the spouse signs the DFAS application form.

(8) The order must be a final decree from which no appeal may be or has been taken within the time allowed for appeal.

(9) For division of retired pay, evidence must be provided or set forth in the order that the spouse was married to the soldier for at least 10 years during which the soldier performed at least 10 years creditable service.

(10) The order must provide for payment of: (a) an amount expressed in dollars; (b) an amount expressed as a percentage or fraction of disposable retired/retainer pay; or (c) if the parties were divorced while the soldier was still on active duty, either an amount to be derived from a formula, or a hypothetical retired pay amount, as set forth below. (Methods (a) and (b) are also available to parties divorced while the soldier was still on active duty.)

(11) In order for DFAS to accept a formula, the missing element must be either the soldier's years of service or the total retirement points earned by a reservist. The formula would be stated as follows:

(a) Active duty personnel:

$$50\% * x \frac{\text{Total \# of months married during military service}}{\text{Total \# months of creditable military service upon retirement}} x \text{Retired Pay of Soldier at Retired or Given Grade}$$

[* or other appropriate percentage]

(b) Reserve Personnel:

$$50\% * x \frac{\text{Total \# of retirement points earned during marriage}}{\text{Total \# of retirement points earned during military service}} x \text{Retired Pay of Reservist at Retired or Given Grade}$$

[* or other appropriate percentage]

(12) As an example of an acceptable hypothetical retired pay amount, one that is conditional or based upon the occurrence of certain facts or events, let us assume that a major (O-4) with 15 years of service separates from his wife after 10 years of marriage. In Virginia, a spouse's claim to military retired pay is based on the length of time between marriage and marital separation, not divorce, so the wife is awarded 33% of the disposable military retired pay the

husband would have received if he had retired as a major. Since we cannot know at what rank the husband will eventually retire, the wife's award must be stated in the form of a hypothetical:

The Husband's future military retired pay constitutes marital property *to the extent that it is based on active duty service performed between the date of marriage and the date of marital separation*--that is, 120 months. On the date of separation, March 14, 1982, the Husband was a Major (O-4) with 180 months of creditable military service.

The Husband agrees to pay to his wife 33% of the amount the Husband would have received if he retired on his actual date of retirement as a major with 20 years of creditable military service.¹

The Wife shall be entitled to the same percentage of all cost of living increases which the Husband receives subsequent to his retirement.

(13) If the husband eventually retires as a colonel (O-6) on March 14, 1995 with 28 years of military service and the wife has submitted a perfected application, DFAS will compute the hypothetical award on the basis of the service member's retired pay at the time of retirement by converting the award to a percentage of current disposable pay (if the order provides for cost-of-living adjustments) or a fixed dollar amount (if the order does not provide for cost-of-living adjustments).

(14) In our example, since the order provides for cost-of-living adjustments, the wife will receive *16.08%* of her former husband's disposable military retired pay, including all cost of living adjustments and increases which he receives. DFAS would compute this by using

¹ The hypothetical must specify the criteria to be used, e.g., major with 20 years of service on the actual date of retirement.

the following formula: $\$2032.80^2 \text{ DIVIDED BY } \$4171.65^3 = 48.72\% \text{ MULTIPLIED BY } 33\%^4 = 16.08\%$.

g. DFAS will make payments to spouses within 90 days after effective service of a perfected application on DFAS. Applicants will be notified in writing whether their application will be accepted or denied, and if denied, what additional requirements must be satisfied. Members are given notice and a copy of the court order submitted with the spouse's perfected application, and have 30 days from the date the notice is mailed to provide proof to DFAS that the order has been amended, superseded or set aside.

h. Regardless of the language of the court order, DFAS will construe awards as a percentage of "disposable" retired pay as defined in Title 10, U.S. Code § 1408 if the order is expressed in terms of a percentage, that is, the soldier's gross pay minus deductions required by law (Common deductions include the amount waived in order to receive compensation under Titles 5 or 38 of the U.S. Code regarding federal employment, the amount of a soldier's disability retired pay, or the amount of any Survivor Benefit Plan annuity premiums paid on behalf of the spouse or former spouse.)

i. DFAS will not honor orders which are not explicit as to what is being awarded (e.g., division of retired pay, child support, alimony) or *conditional* awards which contain the word "if" or which provide for fixed amounts with cost of living adjustments or for offsets against the amount to be paid.

MAJ Thomas K. Emswiler/(703) 697-3170

² The amount the member would have received if he had retired on the actual date of retirement, but as a major with 20 years of service, i.e., 50% of \$4065.60.

³ The amount the member actually receives upon retirement as a colonel with 28 years of service, i.e., 70% of \$5959.50.

⁴ The percentage of retired pay the member agreed to pay to the spouse in the divorce decree.

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Appendix L

**Extract From Army OTJAG Message
Subject: Division of Military Retirement/VSJ/SSB in
Divorce Proceedings
(Minor editing to incorporate changes in state court
positions incorporated by
The Judge Advocate General's School,
Administrative & Civil Law Dept.)**

HQ DA WASH DC //DAJA-LA//

UNCLAS

FOR SJA/JA/LEGAL COUNSEL

SUBJECT: DIVISION OF MILITARY RETIREMENT PENSIONS/VSJ/SSB IN DIVORCE PROCEEDINGS

1. LEGAL ASSISTANCE ATTORNEYS (LAA'S) ADVISING CLIENTS CONTEMPLATING SEPARATION OR DIVORCE MUST DISCUSS THE ISSUE OF THE DIVISIBILITY OF THE SERVICE MEMBER'S MILITARY RETIREMENT PENSION REGARDLESS OF WHICH SPOUSE IS BEING ADVISED. SOME GENERAL KNOWLEDGE REGARDING THE HANDLING OF THIS ISSUE BY THE VARIOUS STATES IS THEREFORE ESSENTIAL. THE PURPOSE OF THIS MESSAGE IS TO ALERT YOU TO SOME RECENT--AND NOT SO RECENT-- DEVELOPMENTS IN THIS AREA.
2. SOME SERVICE MEMBERS WITH "NONVESTED PENSIONS" (ALSO CALLED "UNVESTED") MAY WISH TO RELY ON THE LAWS OF THOSE STATES THAT, ALTHOUGH THEY ALLOW MILITARY PENSION DIVISION, DO SO ONLY IF THE PENSION IS VESTED. THESE STATES WILL NOT DIVIDE A MILITARY PENSION UNLESS IT HAS VESTED BY THE "DATE OF CLASSIFICATION". THE DATE OF CLASSIFICATION IS THE DATE OF THE EVENT UNDER APPLICABLE STATE LAW THAT DETERMINES HOW THE COUPLE'S PROPERTY WILL BE CLASSIFIED FOR PURPOSES OF DISPOSITION IN THE DIVORCE. THIS MAY BE THE DATE OF MARRIAGE BREAKDOWN, SEPARATION, SUMMONS ISSUANCE, OR DIVORCE. VESTING UNDER STATE LAW USUALLY OCCURS AT THE EIGHTEENTH OR TWENTIETH YEAR OF MILITARY SERVICE--THAT IS WHEN A MEMBER IS "LOCKED IN" AND IS "ENTITLED" TO SERVE UNTIL RETIREMENT. IF VESTING HAS NOT OCCURRED BY THE APPLICABLE DATE OF CLASSIFICATION, THEN THE SERVICE MEMBER CAN AVOID DIVISION OF THE PENSION. STATES THAT REQUIRE VESTING OF MILITARY RETIREMENT PENSIONS INCLUDE NORTH CAROLINA, ARKANSAS, INDIANA, TENNESSEE, AND COLORADO. (CHECK THE MOST RECENT FAMILY LAW GUIDE'S "STATE-BY-STATE ANALYSIS" PUBLISHED BY TJAGSA TO GET A COMPLETE LIST OF STATES.)

3. THE VAST MAJORITY OF STATES DO NOT RELY ON "VESTING" BY THE APPLICABLE CLASSIFICATION DATE IN ORDER TO DIVIDE A MILITARY PENSION. IN NEW HAMPSHIRE, FOR EXAMPLE, WHERE BOTH VESTED AND NONVESTED PENSION RIGHTS ARE DIVISIBLE (N.H. REV. STAT. ANN. 458.16-A), A DIVORCE COURT DIVIDED THE PENSION RIGHTS OF AN AIR FORCE MAJOR WITH TEN YEARS OF CREDITABLE SERVICE (HALLIDAY V. HALLIDAY, 593 A.2D 233 (N.H. 1991)). IN A NEW JERSEY CASE, AN APPELLATE COURT HELD THAT THE NONVESTED MILITARY RETIREMENT RIGHTS OF A SERGEANT WITH 16 YEARS OF ACTIVE DUTY WERE DIVISIBLE MARITAL PROPERTY. WHITFIELD V. WHITFIELD, 222 N.J. SUPER. COURT. 36, 535 A.2D 986 (N.J. SUPER. CT. APP. DIV. 1987).

4. ALTHOUGH OVERTURNED BY SUBSEQUENT MISSISSIPPI DECISIONS RECOGNIZING THE AUTHORITY TO DIVIDE MILITARY PENSIONS AS PROPERTY, THE MISSISSIPPI SUPREME COURT'S DECISION IN FLOWERS V. FLOWERS, S.CT. MISS, NO. 91-CA-1154, 1993 MISS. LEXIS 426 (SEP 30, 1993) IS INSTRUCTIVE ON THE ISSUE OF CHOICE OF LAW. LAA'S WHO READ THE OPINION CLOSELY WILL APPRECIATE ITS EMPHASIS ON "CHOICE OF LAW" IN PENSION DIVISION LITIGATION: "WHERE THE SERVICEMAN HAD HIS DOMICILE IN A COMMUNITY PROPERTY STATE FOR ALL OR PART OF THE TIME HE SERVED IN THE ARMED FORCES, THIS STATE WILL RESPECT RIGHTS THE LAW OF SUCH STATE VESTS IN THE SERVICEMAN'S FORMER SPOUSE." DO NOT ALWAYS ASSUME THAT THE LAW OF THE FORUM GOVERNS IN PENSION DIVISION. LOOK AT THE LAW OF THE SERVICE MEMBER'S DOMICILE AND, IF DIFFERENT FROM--AND MORE FAVORABLE THAN--THAT OF THE FORUM, MAKE AN ARGUMENT, WHEN DRAFTING SEPARATION AGREEMENTS, FOR APPLYING "DOMICILE LAW" TO THE ISSUE RATHER THAN "FORUM LAW."

5. LAA'S SHOULD ALSO BE PREPARED TO ADDRESS THE ISSUE OF THE DIVISIBILITY OF VOLUNTARY SEPARATION BONUSES (I.E., THE VOLUNTARY SEPARATION INCENTIVE (VSI) AND THE SPECIAL SEPARATION BENEFIT (SSB)) WHEN COUNSELING CLIENTS ABOUT DIVORCE AND WHEN PREPARING SEPARATION AGREEMENTS.

A. THERE IS AN ISSUE AS TO WHETHER THE VSI OR SSB IS DIVISIBLE MARITAL PROPERTY BASED ON THE WORDING OF 10 U.S.C. SEC. 1408(C)(1), WHICH LIMITS STATES TO THE DIVISION OF "DISPOSABLE RETIRED PAY." THUS, THE LAW WHICH APPLIES TO SEPARATION BONUSES IS PRE-UNIFORMED-SERVICES-FORMER-SPOUSES'-PROTECTION-ACT (USFSPA) LAW UNDER THE MCCARTY DECISION, LEAVING THE BONUSES (PROBABLY) NOT DIVISIBLE UNLESS CONGRESS SAYS OTHERWISE. CONGRESSWOMAN SCHROEDER SPONSORED AN AMENDMENT TO H.R. 5006, THE D.O.D. REAUTHORIZATION BILL FOR FY 1993, WHICH WOULD HAVE MADE THE USFSPA APPLICABLE TO BOTH VSI AND SSB. ALTHOUGH SUPPORT ON THE HOUSE ARMED SERVICES COMMITTEE FOR PASSAGE OF THIS AMENDMENT AT THAT TIME APPARENTLY WAS LACKING, IT WILL PROBABLY BE REINTRODUCED IN THE 103RD CONGRESS.

B. DESPITE 10 U.S.C. SEC. 1408(C)(1), SOME COURTS ARE DIVIDING VSI AND SSB IN DIVORCE CASES (SEE, E.G., "COURT GIVE EX-SPOUSES PART OF EXIT BONUSES," NAVY TIMES, 16 AUG 93, AND DRINGMAN V. DRINGMAN, PIMA COUNTY (ARIZONA) SUPERIOR COURT NO. D-70901, JUDGMENT FILED 10 AUGUST 1993). A RECENT TEXAS CASE ALSO DIVIDED THE VSI AS A COMMUNITY PROPERTY ASSET. SOME SERVICE MEMBER CLIENTS MAY HAVE EXISTING COURT ORDERS FOR PENSION DIVISIONS AND INQUIRE AS TO WHETHER THEY CAN NOW "DEFEAT" THIS DIVISION BY ACCEPTING A VSI OR SSB. WITHOUT STATUTORY AND/OR CASE LAW AUTHORITY WHICH PROVIDES THAT SUCH PAYMENTS ARE NOT DIVISIBLE AS MARITAL PROPERTY, THE CLIENT SHOULD CONSIDER THAT A JUDGE MIGHT INCLUDE THE SEPARATION BONUS UNDER THE EXISTING ORDER.

C. IF A COURT, REGARDLESS OF STATUTORY AUTHORIZATION OR FEDERAL PREEMPTION, DIVIDES VSI AND SSB, THEN SEVERAL ANALYSES ARE POSSIBLE AS BASES FOR THE DIVISION. SOME COURTS HAVE HELD THAT SEVERANCE PAY IS NOT MARITAL PROPERTY SINCE IT TAKES THE PLACE OF FUTURE COMPENSATION, RATHER THAN BEING FOR PAST SERVICES (LIKE RETIREMENT PAY AND OTHER DEFERRED COMPENSATION BENEFITS). IN RE MARRIAGE OF DE SHURLEY, 255 CAL. RPT.R. 150, 207 CAL.APP.3D 992 (1989) AND IN RE MARRIAGE OF LAWSON, 256 CAL.RPT. 283, 208 CAL.APP.3D 446 (1989).

D. IF, ON THE OTHER HAND, VSI AND SSB ARE SEEN AS AN ECONOMIC BENEFIT EARNED DURING THE MARRIAGE AND ATTRIBUTABLE TO MARITAL WORK, EFFORTS, AND LABOR, THEY MAY BE SEEN AS DAMAGES FOR AN ECONOMIC LOSS TO THE MARRIAGE. THIS IS CALLED THE "ANALYTIC APPROACH" AND IS MOST OFTEN APPLIED IN THE PERSONAL INJURY AREA. JOHNSON V. JOHNSON, 317 N.C 437, 846 S.E.2D 430 (1986). IN AN ARKANSAS CASE INVOLVING SEVERANCE PAY, THE WIFE WAS GRANTED ONE-HALF OF THE HUSBAND'S LUMP-SUM PAYMENT BECAUSE THE JUDGE DETERMINED THAT THE BENEFIT WAS EARNED BY SERVICE DURING THE MARRIAGE. DILLIARD V. DILLIARD, 772 S.W.2D 355 (ARK.CT.APP.1989) SEE ALSO CHOTINER V. CHOTINER, 829 P.2D 829 (ALASKA 1992). EVEN IF THE PAYMENT IS MARITAL PROPERTY AND THEREFORE DIVISIBLE, ONE WOULD NEED TO APPLY THE MARITAL FRACTION (YEARS OF MARITAL SERVICE OVER TOTAL YEARS OF SERVICE) TO THE LUMP-SUM PAYMENT TO ARRIVE AT THE PORTION THAT IS MARITAL.

E. SOME COURTS IN "VESTING STATES" TAKE THE POSITION THAT THE SEVERANCE PAY MUST BE AUTHORIZED OR RECEIVED ON OR BEFORE THE DATE OF CLASSIFICATION (AS DISCUSSED IN PARAGRAPH 2 ABOVE) IN ORDER FOR THE COURT TO BE ABLE TO DIVIDE IT; IF IT IS AUTHORIZED OR RECEIVED AFTER THAT DATE, IT IS NOT MARITAL PROPERTY AND IS NOT DIVISIBLE. (SEE, E.G., BOGER V. BOGER, 103 N.C.APP 340, 450 S.E. 2D 591 (1991).

F. LAA'S SHOULD BE AWARE THAT DFAS WILL NOT GARNISH VSI OR SSB UNDER 10 U.S.C. SEC. 1408(D) PURSUANT TO COURT ORDERS FOR PROPERTY DIVISION. ONLY MILITARY RETIREMENT PAY CAN BE GARNISHED UNDER 10 U.S.C. SEC. 1408(D). THERE ARE SEVERAL OTHER ALTERNATIVES FOR GARNISHING THE

VSI AND SSB. PUBLIC LAW 103-94, WHICH PROVIDES FOR INVOLUNTARY ALLOTMENTS FROM MILITARY PAY FOR JUDGMENT INDEBTEDNESS, MAY BE USED AFTER APRIL 1994 FOR GARNISHING PURSUANT TO A COURT ORDER DIVIDING THE VSI OR SSB. IF THE COURT ORDER IS FOR CHILD SUPPORT AND/OR SPOUSAL SUPPORT THE VSI AND SSB CAN BE GARNISHED UNDER EITHER 42 U.S.C. SEC. 659, WHICH IS THE GARNISHMENT STATUTE OR 42 U.S.C. SEC. 665, WHICH IS THE INVOLUNTARY ALLOTMENT STATUTE.

6. WHEN COUNSELING CLIENTS ABOUT DIVORCE, LAA'S MUST CONSIDER ALL THE OPTIONS AVAILABLE TO THE CLIENT AND TO THE CLIENT'S SPOUSE. IN MANY MARRIAGES THE MILITARY PENSION OFTEN IS THE LARGEST ASSET OF THE PARTIES. RECOMMENDING A CLIENT FILE A DIVORCE IN A PARTICULAR JURISDICTION FOR FAVORABLE TREATMENT IN PENSION DIVISION MAY ULTIMATELY COST OR SAVE A CLIENT HUNDREDS OF THOUSANDS OF DOLLARS OVER A LIFETIME. IT MAY ALSO RESULT IN LITIGATION, PERHAPS NEEDLESS, IN MORE THAN ONE JURISDICTION OVER THE DIVORCE, PROPERTY RIGHTS, AND RELATED MATTERS.

7. IN TWO COMMUNITY PROPERTY STATES, COURTS HAVE REOPENED DIVORCE CASES FROM 1966 (CALIFORNIA) AND 1973 (NEW MEXICO) AND DIVIDED MILITARY PENSIONS WHERE THE ORIGINAL PROPERTY SETTLEMENTS DID NOT ADDRESS THE MILITARY RETIREMENT PENSION. BOTH COURTS RELIED ON THE FACT THAT THE SETTLEMENT FAILED TO MENTION THE MILITARY RETIREMENT PENSION AS MARITAL PROPERTY (SEE 1993 CAL. LEXIS 217. THE NEW MEXICO CASE IS NOT YET PUBLISHED.) MILITARY RETIREES WITH PRE-EXISTING PROPERTY SETTLEMENTS PREDATING THE USFSPA SHOULD BE REFERRED TO CIVILIAN ATTORNEYS WHO ARE VERY FAMILIAR WITH SUCH ISSUES IN THE APPLICABLE JURISDICTIONS.

8. LAA'S SHOULD CLEARLY ADDRESS THE MILITARY PENSION BENEFITS, THE VSI, AND THE SSB IN SEPARATION AGREEMENTS. THE MILITARY PENSION BENEFITS, THE VSI, AND THE SSB SHOULD BE BE DIVIDED, NOT DIVIDED (WITH INTERESTS WAIVED), OR JURISDICTION OF THE ISSUES RESERVED FOR FUTURE NEGOTIATION REGARDLESS OF WHICH SPOUSE THE LAA IS ASSISTING. DRAFTING A SEPARATION AGREEMENT THAT IS SILENT ON SUCH ISSUES, REGARDLESS OF WHICH SPOUSE IS REPRESENTED, OPENS THE DOOR TO A LEGAL MALPRACTICE CLAIM. NEVERTHELESS, IF FOR A TACTICAL REASON A LAA PREPARES A SEPARATION AGREEMENT THAT IS SILENT ON THE ISSUES OF VSI AND SSB, THE LAA SHOULD COUNSEL THE CLIENT APPROPRIATELY AND MAKE A MEMORANDUM FOR THE RECORD ABOUT THE COUNSELING.

APPENDIX M

INFORMATION PAPER

JAGS-ADA-LA

7 Jun 96

SUBJECT: SBP in Marital Dissolution Actions

1. The Survivor Benefit Plan is an annuity that allows retired members of the Armed Forces (both active duty and reserve components) to provide continued income to named beneficiaries in the event of the retiree's death. The Plan's provisions are codified at 10 U.S.C. § 1447-1455.

a. SBP participation is optional, but in most cases a married member on active duty cannot elect out of the program without his or her spouse's consent (10 U.S.C. § 1448(a)(3)(A)). A member of a reserve component can choose not to participate without spousal concurrence, but if he or she does decide to enroll, then the spouse must consent to participation at less than the maximum level (10 U.S.C. § 1448(a)(3)(B)).

b. For married members on active duty, the SBP election must be made before retirement (10 U.S.C. § 1448(a)(2)(A)). For members of reserve components, the election can take place upon completion of 20 years of service, and the member has a second chance to elect to participate upon reaching age 60 (10 U.S.C. § 1448(a)(2)(B)). Other than this second chance for those in the reserve components, once the election to participate or not to participate is made, it is largely irrevocable; there are only a few very limited exceptions to this rule.

2. An election to participate involved two choices--the naming of beneficiaries and a determination of the amount of the annuity. Beneficiaries can include the member's spouse, a former spouse, the member's dependent children, a spouse or former spouse together with the dependent children, or in some cases an individual qualifying as a natural person with an insurable interest in the member's life. The member also decides how much the annuity will pay the beneficiaries by choosing a level of participation. This is done by designating a "base amount;" the minimum base amount is \$300, and a member can select this level or any amount above \$300, in \$100 increments, up to the full amount of his or her military retired pay.

a. The cost will depend on the beneficiary and the base amount selections. The monthly premiums are automatically deducted from military retired pay, and there is a tax break since the amount of SBP premiums are deducted from retired pay before taxes are calculated (thus, SBP premiums are paid with tax-free dollars).

b. The annuity for a spouse or former spouse will be 55% of the base amount. This payment drops when the beneficiary reaches age 62, and the amount of the reduction for elections previously made (and those made in the future by members who were retirement

eligible on or before 2 Oct 85) is controlled by a fairly complex set of rules. The rule is simple for most future elections, however; if the member was not retirement eligible as of 2 Oct 85, the annuity goes down to 35% of the base amount when the beneficiary reaches age 62.

c. The annuity stops altogether if the beneficiary remarries before reaching age 55. Payments are revived, however, if the subsequent marriage is terminated in any manner.

(1) It may not be wise to designate a former spouse as an SBP beneficiary in cases where he or she has reasonable prospects for remarriage.

(2) Life insurance or a commercial annuity may provide better protection for a younger former spouse who may remarry (assuming that state law would require the member to provide continuing income protection for such a former spouse).

3. The Uniformed Services Former Spouses' Protection Act initially authorized members to designate a former spouse as a beneficiary, but only if the member voluntarily elected to do so and only in the category of a natural person with an insurable interest.

a. Congress subsequently amended the SBP provisions to allow a former spouse to be treated the same as a current spouse for SBP purposes.

b. In 1986, Congress authorized state courts to order members to designate former spouses as SBP beneficiaries. State law controls whether such an order will be issued. Congress also authorized the member and former spouse to enter into a voluntary written agreement making the former spouse a beneficiary.

c. There is one important procedural aspect regarding former spouses designation. A member may be "deemed" to have designated a former spouse as an SBP beneficiary even if the member did not provide the agreement or court order to finance. (10 U.S.C. § 1450(f)(3)(A)).

(1) This "deemed" election is not automatic; it must be triggered by a request from the former spouse, and the request must be sent to the appropriate military finance center not later than 1 year after the date of the court order (10 U.S.C. § 1450(f)(3)(B)) or for voluntary agreements, the date of the divorce (10 U.S.C. § 1448(b)(3)(A)).

(2) Once a timely request is made, the finance center will flag the member's records, and upon his or her retirement the former spouse will be designated as an SBP beneficiary.

4. A member is allowed only one SBP plan; a second spouse cannot be named as an SBP beneficiary as long as a former spouse holds that designation. A second spouse can be substituted as the beneficiary in place of the former spouse under limited circumstances.

a. If the original designation was pursuant to a court order, then the request for substitution will not be honored without an amending court order that allows the change.

b. If the original designation was pursuant to a written agreement, then the request for substitution will not be honored without the written agreement of the former spouse.

5. Special rules apply when the marriage ends after the member has retired. If the member elected not to participate at the time of retirement (or at the time of marriage after retirement), the dissolution does not revive the option of electing to participate. Thus, courts should not order retirees to provide SBP protection for former spouses in these cases because the retiree cannot do so.

6. The address and telephone number for the military finance center that handles SBP is:

Defense Finance and Accounting Service (DFAS)
Cleveland Center
Retired Pay
1240 East 9th Street
Cleveland, Ohio 44199-2055

MAJ Mark E. Henderson/(804) 972-6359

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APPENDIX N

DIVISIBILITY OF SSB AND VSI IN DIVORCE CASES

A. **Special Separation Benefit (SSB; 10 U.S.C. § 1174a).** SSB is a one-time payment of a sum calculated by multiplying 15% times the member's annualized basic pay at time of separation (monthly basic pay x 12), times the number of years of active service. For example, in 1995, an E-6 with 10 years service would have an annualized basic pay of \$20,422.80 (\$1701.90 x 12); times 15% = \$3,063.42; times 10 years service yields a single lump-sum payment at separation of \$30,634.20.

B. **Voluntary Separation Incentive (VSI; 10 U.S.C. § 1175).** VSI is an annuity, paid annually for twice the number of years of active duty service; the annual payment is calculated by multiplying 2.5% times final annualized base pay times the number of years of active service. For example, in 1995 an E-6 with 10 years service would have an annualized base pay of \$20,422.80 (\$1701.90 x 12); times 2.5% = \$510.57; times 10 years in service equals \$5,105.70 (this is the amount paid annually on the date of separation and on the next 19 anniversaries), for a total payout of \$102,114 over the life of the annuity. There are no "COLAs" on VSI annuity payments.

C. **Divisibility of SSB and VSI.**

1. Military "disposable retired or retainer pay" is divisible in most states by the combined effect of the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408(c)(1), and the individual state's marital dissolution laws. However, **neither SSB nor VSI are military "retired or retainer" pay**; thus, whether applying a basic canon of statutory construction (*expressio unius est exclusio alterius*) or Justice Scalia's more blunt jurisprudential philosophy (*the law means what it says*), **USFSPA does not on its face provide a basis for dividing SSB or VSI as marital property.**

2. Nevertheless, some trial-level courts, and at least one appellate court, are treating SSB & VSI as the "functional equivalent of retired pay" and dividing it. *Abernethy v. Fishkin*, 638 So. 2d 160 (Fla. Dist. Ct. App., 5th Dist., 10 Jun 94); *In re Crawford*, 1994 Ariz. App. LEXIS 84 (Ariz. App., 29 Apr 94); *Dringman v. Dringman* (Super. Ct., Pima Cty, AZ, No. D-70901 (Aug 1993)); *Blair v. Blair*, Mont.Sup.Ct., No. 94-521, 18 May 95; *Kulscar v. Kulscar*, Okla.Ct.App., No. 82558, 2 May 95; *In re McElroy*, Colo.Ct.App., No. 94CA0957, 10 Aug 95; *In re Shevlin*, Colo.Ct.App., No. 94CA1250, 10 Aug 95; see also "Courts give ex-spouses part of exit bonuses" - *Navy Times*, 16 Aug 93. The *Crawford* opinion determined that division of SSB was not inconsistent with congressional intent to provide SSB as part of "a comprehensive package of transition benefits to assist separating personnel *and their families*," H.R. Rep. No. 665, 101st Cong., 2d Sess. (1990) (emphasis added). Further, the *Crawford* court applied a basic principle of community property law that a party should not be permitted, by unilateral action (such as foregoing retirement to accept separation benefits), to transmute community property into separate property, and held without further analysis "that the trial court had jurisdiction to treat Michael's SSB payment as a community asset under 10 U.S.C. § 1408 and award an equitable portion of it to Leslie." (Leslie had been awarded a 32½ percent share of Michael's retired pay when the parties divorced in 1989, two years before Congress even enacted the "readjustment benefits" program. Michael elected to separate with SSB in 1992, after more than 19 years of military service.) Courts holding that VSI/SSB payments are not marital assets subject to distribution include *Baer v. Baer*, 1995 Fla. App. LEXIS 25, 20 Fla. Law W. D 121 (Fla. Dist. Ct. App., 1st Dist., 4 Jan 95); *Kelson v. Kelson*, 647 So. 2d 959 (Fla. Dist. Ct. App., 1st Dist., 7 Dec 94); *McClure v. McClure*, 1994 Ohio App. LEXIS 4534 (2nd App. Dist., 5 Oct 94); *Strock v. Strock*, 865 P.2d 1272 (Okla. Ct. App., Div. 3, 2 Nov 93).

3. Various *arguments* and *theories* may be constructed on why SSB or VSI payments should or should not be considered as divisible marital property. Here are some of them:

a. Acquisition of benefit during the marriage. If, as of the date of release from active service, the marriage exists (and if marital separation or other pre-dissolution event that terminates the relevant period for acquiring marital property has not occurred), the loss of employment is likely to be considered a marital loss, and the readjustment benefit acquired thereby might be considered marital property. See, e.g., *Chotiner v. Chotiner*, 829 P.2d 829 (Alaska 1992) [Military severance payment under 10 U.S.C. § 667, received during the marriage, is marital property only to the extent attributable to work performed during the marriage, but separate property to the extent attributable to work performed prior to the marriage]. Characterization as marital property may be particularly strong when SSB is involved, the entire bonus has been received during the marriage, and the SSB has been commingled with other marital property such as savings accounts, investments, or purchases prior to the divorce or pre-dissolution separation. Refuting this argument may be difficult, likely requiring recognition of the readjustment benefit as separate property of the member under state law, and perhaps also including separate maintenance of the benefit after acquisition - i.e., no commingling or "conveyance to the marital estate." See *Chotiner, supra* at 832-833. Also, the preemption argument of *McCarty* (see below) may require that SSB or VSI be treated as non-divisible separate property of the member, regardless of whether the benefit is received during or after the marital period.

If a servicemember intends marital dissolution and is also facing a voluntary separation, accelerate the divorce (or pre-dissolution separation) and delay the service separation to best position the member to preserve the readjustment benefit as separate property. However, this tactic may fail; the Court may not "allow one party to retain all the compensation for unilaterally altering a retirement plan asset in which the other party has a court-decreed interest." *Kulscar v. Kulscar*, Okla.Ct.App., No. 82558, 2 May 95.

Conversely, the spouse in such a situation would be well advised to delay the divorce (or pre-dissolution separation) until after the member's release from active duty and receipt of the readjustment benefit.

b. Acquisition after the marriage - divisible. If separation and acquisition of SSB or VSI occurs after divorce (or pre-dissolution separation), but the marital period and the dates of military service overlapped, the benefit payment (or, in the case of VSI, payments) might be divisible marital property if characterized as additional compensation for past military service. *Chotiner, supra*. In another context, the IRS has ruled exactly that for "lump-sum readjustment payments" under a 1950's statute, finding that the payment was based upon and had a direct relation to the number of years of active service. Rev. Rul. 58-496 (1958 - 2 C.B. 20); Rev. Rul. 67-350 (1967 - 2 C.B. 58); Priv. L. Rul. 561009515OA (Oct. 9, 1956). Cf. *Felman v. C.I.R.*, 49 T.C. 599 (1968). VSI and SSB are similarly computed.

c. Acquisition after the marriage - not divisible. Even though the marital period and the dates of military service overlapped, if service separation and acquisition of SSB or VSI occurs after divorce (or pre-dissolution separation) it can be argued that the benefit payment (or, in the case of VSI, payments) is separate property and is not divisible because its purpose is to assist the divorced (separated) member's forthcoming adjustment to civilian life, and not to compensate the member for past services. *In re the Marriage of Kuzmiak*, 222 Cal. Rptr. 644 (Cal. App. 1986); *Perez v. Perez*, 587 S.W.2d 671 (Tex. 1979) [both cases so holding for the involuntary separation payment under 10 U.S.C. § 1174]. Alternatively, SSB or VSI would be separate property if viewed as compensation for lost future earnings that would have been realized by continued service wholly outside the marital period. See *Boger v. Boger*, 405 S.E.2d 591 (N.C. App. 1991) [analyzing an incentive increase in private pension benefits].

d. Not divisible - *McCarty* preemption. *McCarty v. McCarty*, 453 U.S. 210 (1981), invalidated California's attempt to divide military pensions after finding that allowing such treatment would "do clear damage to important military personnel objectives" and "that Congress intended that military retirement pay reach the veteran and no one else." *Mansell v. Mansell*, 490 U.S. 581, 584 (1989). Of course, Congress accepted the Supreme Court's offer to change things, and passed USFSPA

to permit states to treat a military pension as marital property. In enacting the laws creating the SSB and VSI, however, Congress did *not* include in either statute a section permitting states to treat the benefits as marital property. While one could argue that such an authorization really necessary, since domestic relations law is wholly "state law" in character, the Supreme Court found such an authorization necessary in *McCarty* because of the conflict between the federal benefit program (military retirement system) and state action concerning divisibility. Applying the same rationale, absent authorization in Federal law to divide SSB and VSI, states should be precluded from making such divisions. The argument, identical to that raised in *McCarty*, is that allowing states to divide either SSB or VSI has the potential to disrupt military personnel management and significantly interfere with the goal of achieving orderly downsizing to a smaller force; further, it reduces the amount Congress thought the member should receive to facilitate transition to civilian life, discourages separation, and encourages retention (since current income realized after divorce would not be divisible as marital property). The language of the Supreme Court in *McCarty* lends itself easily to the SSB/VSI issue: "Congress has determined that a younger [smaller] military is essential to the national defense; it is not for the States to interfere with that goal by lessening the incentive to retire [separate] created by the military retirement [readjustment benefits] system." *McCarty*, at 235 [substituting readjustment benefits language in the brackets]. The *Crawford* opinion does not squarely address this issue, but summarily holds that USFSPA provides the basis for dividing SSB.

4. Legislative outlook. A bill, H.R. 3574, was introduced in the 103rd Congress that would authorize division of SSB and VSI "in the same manner as retired pay is treated under" the USFSPA. The purported justification for H.R. 3574 was, at best, disputable. The bill's sponsor assumed that "military members choose [VSI and SSB]...in lieu of their traditional retirement packages." Rep. Schroeder, "Extensions to Remarks," Cong. Rec., E-2966. Given the current reality of downsizing, it is reasonable to assume that most individuals are electing readjustment benefits not as an alternative to retirement, but because of diminishing opportunities for a fruitful military career. At one time transitioning personnel presumably had less need of readjustment benefits, but the Congress, in the FY-92/93 Authorization Act, thought such benefits necessary to provide for "that portion of the career personnel inventory that is not retirement eligible ... a reasonable, fair choice" to elect in lieu of facing involuntary separation at a time not of their own choosing. Joint Explanatory Statement of the Committee of Conference (hereinafter "Conference Report"), secs. 661-664 (emphasis added). The title of this section of the Conference Report is telling: *Temporary authority to provide involuntary separation pay and transition benefits to active duty personnel electing to voluntarily separate in lieu of facing selection for involuntary separation*. Seen in this context, SSI and VSI differ markedly from retired pay; the benefits were intended as the alternative to involuntary separation with only limited transition benefits (or with no benefits at all). H.R. 3574 and a similar bill during the 102nd Congress did not make it out of committee. No similar bill has yet been introduced in the 104th. While passage of such legislation would eliminate the *McCarty* preemption defense, divisibility would remain *unsettled* as various states differ in their treatment of separation benefits as divisible property. □

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APPENDIX O

THE ARMY LAWYER, LEGAL ASSISTANCE PRACTICE NOTES RELATING TO THE UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

Published by the TJAGSA Legal Assistance Branch

REDUCTIONS IN DISPOSABLE RETIRED PAY TRIGGERED BY RECEIPT OF VA DISABILITY PAY: A BASIS FOR REOPENING A JUDGMENT OF DIVORCE?

The Army Lawyer - October 1995

In *Torwich v. Torwich*, a New Jersey appellate court recently held that a retired member's waiver of retired pay in order to receive Veterans Administration (VA) disability benefits justifies reopening a property division. [FN23] Citing cases in both Alaska and Florida, [FN24] the court's majority acknowledged the limitations of the United States Supreme Court's decision in *Mansell v. Mansell*, [FN25] while recognizing its own authority to equitably divide marital property including retired pay. [FN26]

Under the terms of the Uniformed Services Former Spouses' Protection Act (USFSPA), states were expressly authorized to divide "disposable retired pay" as "marital property in divorce." [FN27] "Disposable retired pay" equals gross retired pay minus specific deductions. One deduction is retired pay waived in order to receive VA disability benefits. [FN28] When a former spouse's share of retired pay is stated in terms of a percentage, waivers of retired pay can significantly reduce the "disposable retired pay" and the former spouse's share.

In cases where divorce occurs well after retirement, the impact of the definition will likely be fully known, and distributions made by a court or agreement will be unaffected. When divorce occurs before retirement, however, the likelihood of future waivers is largely unknown. In cases where an entitlement to VA benefits is subsequently found, or even more significant, military disability retirement or Dual Compensation Act waivers, the impact on disposable retired pay can be dramatic.

To some extent, the impact of retired pay waivers can be addressed by inserting insulating provisions into an agreement or order. For example, the parties might agree to valuation of military retired pay based on no waivers and consent to continuing jurisdiction for a court to revisit the issue of property in the event of waiver. In the alternative, the parties may agree to a savings provision that adjusts the former spouse's share to prewaiver levels by increasing his or her share of retired pay or requiring payments from other sources. Another possibility is complete waiver in exchange for other assets of mutually agreed upon value.

The outcome in *Torwich* was clearly favorable to the former spouse. Despite this outcome, former spouses should not count on finding a court so favorably inclined in all

jurisdictions. Particularly, given the potential for retired members to argue that the impact of the definition of "disposable retired pay" is foreseeable, practitioners must take additional steps to insulate former spouses. [FN29] Major Block.

Footnotes

FN23. *Torwich (Abrom) v. Torwich*, 21 Fam. Law Rept. (BNA) 1453 (N.J. Super. Ct. App. Div. July 3, 1995).

FN24. *Id.* at 1454 (citing *Clausen v. Clausen*, 831 P.2d 1257 (Alaska 1992); *McMahan v. McMahan*, 567 So.2d 976 (Fla. Dist. Ct. App. 1990)).

FN25. 490 U.S. 581 (1989). In *Mansell*, the Supreme Court held that states have no authority to divide deductions from gross retired pay found in the statutory definition of "disposable retired pay."

FN26. *Torwich*, 21 Fam. Law Rept., at 1455.

FN27. Pub. L. No. 97-252, 96 Stat. 730 (1982), as amended, and codified at 10 U.S.C. ss 1072, 1076, 1086, 1408, 1447, 1448, 1450, 1451.

FN28. *Id.* 10 U.S.C. s 1408(a)(4)(B). It is not unusual for service members to retire based on longevity and later qualify for disability payments from the VA. Receipt of VA disability benefits, which are not taxed, is conditioned on waiver of an equivalent amount of military retired pay.

FN29. The judge who denied the original motion to reopen reversed on appeal in *Torwich* relied in part on this perspective. See *Torwich*, 21 Fam. Law Rept, at 1454.

WHEN IS PROPERTY NOT REALLY PROPERTY?

The Army Lawyer, September 1995

Military practitioners frequently are involved with division of retired pay as property under the terms of the Uniformed Services Former Spouses' Protection Act (USFSPA). [FN1] Under the terms of the USFSPA, states were expressly authorized to divide disposable retired pay as "property." [FN2] Despite use of the term "property," a close look at Title 10 reveals that what is being called property may not meet traditional expectations.

Property in the context of divorce is generally classifiable as marital or community property as opposed to separate or nonmarital property. [FN3] Through the divorce process, marital property is awarded in full or part shares to the parties, at which time it is recharacterized as separate property. Separate property in the classic sense is then freely alienable or devisable as each individual party sees fit.

Military retired pay divided in divorce as property fails to meet these traditional definitional expectations in several regards. First, it is inalienable during the life of the former spouse. A former spouse awarded a share of military retired pay as property is not free to sell or otherwise transfer his or her share. [FN4] Second, military retired pay awarded as property cannot be devised after death. [FN5] Accordingly, the former spouse's share of retired pay awarded as property reverts to the retiree for as long as the retiree survives the former spouse. All rights to retired pay terminate on the retiree's death. [FN6] Survivors can continue to receive payments, not from retired pay, but from an annuity purchased through the Survivor Benefit Plan. [FN7]

Former spouses will likely continue to press for a share of retired pay as property, at least as long as the interest is allowed to survive remarriage. [FN8] LEGAL ASSISTANCE attorneys will want to insure that they understand the limitations on the "property" that former spouses will obtain. Major Block.

Footnotes

FN1. Pub. L. No. 97-252, 96 Stat. 730 (1982) (codified as amended at 10 U.S.C. ss 1072, 1076, 1086, 1408, 1447, 1448, 1450, 1451 (1993)).

FN2. 10 U.S.C. s 1408(c) (1993).

FN3. Although true in the majority of United States jurisdictions, many jurisdictions retain a framework which permits all property of the parties to be divided. See 3 JOAN M. KRUASKOPF & JUDGE JOHN D. MONTGOMERY, FAMILY LAW AND PRACTICE 37-1 to 37-20 (Matthew Bender, Inc., 1994).

FN4. 10 U.S.C. s 1408(c)(2) (1993).

FN5. Id.

FN6. DEP'T OF DEFENSE, REG. 7000.14, FINANCIAL MANAGEMENT REGULATION, MILITARY PAY POLICY AND PROCEDURES FOR RETIRED PAY, vol. 7B, para. 70101 (June 1995). One recent example of this point being misunderstood can be found in the 24 July 1995 issue of The Army, Times, the "Pay Watch" column, that reported that an illegitimate daughter would share the retired pay of a retiree who died in 1992. Illegitimate Daughter to Share Retired Pay, ARMY TIMES, Jul. 24, 1995, at 6.

FN7. 10 U.S.C. s 1447 (1993). Under 10 U.S.C. s 1450(f)(4), a court can order a person to elect to participate in the SBP to provide an annuity to a former spouse. An article in the issue of The Army Times incorrectly describes the SBP as a plan "that allows service members to bequeath a portion of their retired pay to their families." Illegitimate Daughter to Share Retired Pay, ARMY TIMES, Jul. 24, 1995, at 6.

FN8. See Ex Spouse Debate Renewed, ARMY TIMES, Jan. 23, 1995, at 20. Reporting Rep. Robert K. Dornan's promise to review the Uniformed Services Former Spouses' Protection Act. Military associations like The Retired Officers Association are specifically seeking a change that would terminate payments to former spouses on remarriage.

**USFSPA UPDATE--USING FORMULA CLAUSES TO DEFINE
THE FORMER SPOUSE'S SHARE OF DISPOSABLE RETIRED PAY**

The Army Lawyer, June 1995

Since consolidation of retired pay operations at its Cleveland Center, the Defense Finance and Accounting Service (DFAS) has accepted and processed orders dividing military retired pay as property only when the former spouse's share is stated in terms of a lump sum or a percentage of disposable retired pay.

Prior to consolidation at Cleveland, DFAS operations in Denver, Colorado, and Indianapolis, Indiana, had processed orders which stated the former spouse's share in formula terms. One common formula approach stated the former spouse's share as a percentage determined by the ratio of the time that marriage overlapped with service, and the period of total service.

On 6 April 1995, the DFAS published a new proposed rule in the Federal Register which will again allow a former spouse's share of retired pay to be stated in terms of a formula for orders served on the DFAS after 1 April 1995. [FN21] Under the proposed rule, open formula terms are limited to the member's years of total service, or a hypothetical retired pay amount. The rule also provides guidance on dividing retired pay, and updates addresses the DFAS and the Coast Guard. Pertinent extracts of the proposed rule follow:

FEDERAL REGISTER

Vol. 60, No. 66

Proposed Rules

DEPARTMENT OF DEFENSE (DOD)

Office of the Secretary

32 CFR Part 63

Former Spouse Payments From Retired Pay

60 FR 17507

DATE: Thursday, April 6, 1995

ACTION: Proposed rule; amendment.

SUMMARY: This proposed rule amends part 63 of title 32 of the Code of Federal Regulations to reflect amendments to the Uniformed Services Former Spouses' Protection Act and to clarify the language in section 63.6(c)(8) concerning court orders that provide for a division of retired pay by means of a formula. Guidance implementing the amendments have been incorporated into

Volume 7, Part B of the DOD Financial Management Regulation, DOD 7000.14-R, but has not been previously published in the Federal Register.

DATES: Comments must be received June 6, 1995.

ADDRESSES: Interested parties should submit written comments to: Deputy Director for Finance, Defense Finance and Accounting Service, 1931 Jefferson Davis Highway, Arlington, VA 22240-5291, Attention: Military Pay Directorate.

FOR FURTHER INFORMATION CONTACT: Mr. Fiti Malufau, (703) 602-5279.

SUPPLEMENTARY INFORMATION: Because of the large number of comments anticipated, we do not plan to acknowledge or respond to individual comments but will address the comments, as appropriate, in the preamble of the final rule.

To avoid undue hardship on those seeking to enforce support orders providing for a division of retired pay, the Department of Defense will continue to follow its current implementing guidance with regard to the amendments to the Uniformed Services Former Spouses' Protection Act and, effective April 1, 1995, will accept court orders containing formulas that are consistent with the proposed rule until a final rule is issued.

....
List of Subjects in 32 CFR Part 63: Alimony, Child support, Retirement, Uniformed Services, Payments to former spouses, Military retired pay.

Accordingly, 32 CFR part 63 is proposed to be amended as follows:

PART 63--FORMER SPOUSE PAYMENTS FROM RETIRED PAY

1. The authority citation for part 63 continues to read as follows:

Authority: 10 USC 1408.

2. Section 63.6 is proposed to be amended by adding the word "certified" after the word "A" in paragraph (b)(1)(ii), by revising paragraphs (b)(5), (c)(8) and (e), and by adding a new paragraph (h)(13) to read as follows:

Section 63.6--Procedures.

....
(b) ...

(5) The designated agent for each uniformed service is:

(i) Army, Navy, Air Force and Marine Corps: Defense Finance and Accounting Service, Cleveland Center (Code LF), PO Box 998002, Cleveland, OH 44199-8002.

(ii) Coast Guard: United States Coast Guard, Commanding Officer (L), Pay and Personnel Center, 444 Quincy Street, Topeka, KS 66683-3591.

(iii) Public Health Service: Office of General Counsel, Department of Health and Human Service, Room 5362, 330 Independence Avenue, SW, Washington, DC 20201.

....
(c)

(8) The court order shall require payment of child support or alimony or, in the case of a division of property, provide for the payment of an amount of disposable retired or retainer pay, expressed as a dollar amount or as a percentage. Court orders specifying a percentage or fraction of disposable

retired pay shall be construed as a percentage or a fraction of disposable retired pay. A court order that provides for a division of retired pay by means of a formula wherein the elements of the formula are not specifically set forth or readily apparent on the face of the court order will not be honored unless clarified by the court. For orders served on or after April 1, 1995, an exception to requiring such a clarifying order will be made only if in accordance with (c)(8)(i), (ii) and (iii) of this section:

(i) The order otherwise qualifies for direct payment but the parties are divorced when the member is on active duty. In that situation, where the pertinent court order is expressed in terms of a formula and the element missing from that formula is the member's years of service, then the designated agent will supply the member's years of service in terms of whole months to arrive at a percentage of disposable pay due the former spouse. Partial months of service will be dropped. The member's service that is creditable for retirement percentage multiplier purposes (See Chapter 1, Section C of DoD Financial Management Regulation, DoD 7000.14-R, Volume 7, Part B) will be used in all formulas. In the case of reserve members, points earned during the member's marriage must be contained in the court order. The designated agent will supply total retirement points earned by a reservist if that element is missing from the formula. The formula will be computed based on the member's service for retirement multiplier or points and carried out to four decimal places.

(ii) The order otherwise qualifies for direct payment but the parties are divorced when the member is on active duty and the pertinent court order awarding the former spouse a portion of the member's retired/retainer pay is expressed in terms of a hypothetical retired pay amount--one that is conditional or based upon the occurrence of certain facts and/or events. No application will be processed by the designated agent in the absence of a clarifying order where the hypothetical retired pay amount is to be based upon retired/retainer pay due the member at the time of divorce and the divorce occurs prior to the member's retirement eligibility (at least 15 or 20 years of service) unless the hypothetical retired pay amount is contained in the order or is based on 15 or 20 years of service. All hypothetical awards will be computed on the basis of the member's retired pay at the time of retirement (as explained in paragraph (c)(8)(iii) of this section) and, if the order also provides for the same percentage of cost-of-living adjustments, will be converted to a percentage of current disposable pay. If the hypothetical contained in the court order does not provide for the same percentage of cost-of-living adjustments, then payments will be made in a fixed dollar amount only. As noted in this section, the formula will be carried out to four decimal places.

(iii) Example. A court order awards the former spouse 25% of the member's monthly retired/retainer pay of a retired rank of Captain with 20 years of

service to include the same percentage of cost-of-living increases. The member later retires after 25 years of service as a Major. The monthly retired pay of a Captain with 20 years of service equals \$1000 and the monthly retired pay of a Major with 25 years of service is \$1100; \$1000 divided by \$1100 equals .909091. This amount (.909091) multiplied by 25% (amount of former spouse award) is .2272. This 22.72% award is proportionately the same share as the 25% award in the court order except it is expressed in terms of the member's actual rather than hypothetical retirement pension.

(iv) Except for years of service or date of retirement, as well as hypothetical retired pay amounts mentioned in paragraphs (c)(8)(i) and (ii) of this section, in order to be honored without the necessity of obtaining a subsequent clarifying order from the court, pertinent court orders must contain a fixed dollar amount or a percentage of disposable pay that can be computed using the qualifying court order alone without reference to any facts or values external to the court order dividing the member's retired/retainer pay. [FN22]

Practitioners working with USFSPA issues will appreciate the significance of the new DFAS rule. Attorneys who are working with this issue for the first time should clearly understand that this change is not a license to use formulas of unlimited flexibility. If a member is retired when divorced, all formula terms must continue to be defined in the order or a separation agreement that will become part of an order. Only if the member is not yet retired can years of service (or retirement points in the case of a reserve member) or a hypothetical retired pay amount be left open as a variable which the DFAS will determine at time of retirement. Major Block.

Footnotes

FN21. 60 Fed.Reg. 17,509 (1995).

FN22. Id.

FORMER SPOUSES' PROTECTION ACT UPDATE

The Army Lawyer, December 1994

The State-by-State Analysis of the Divisibility of Military Retired Pay, most recently published in the July 1994 issue of The Army Lawyer, indicates that military retired pay is divisible in Mississippi sometimes. [FN27] This perspective relies on the Mississippi Supreme Court decision in *Flowers v. Flowers*, which held that while no pension rights vest in a spouse as a result of Mississippi law, Mississippi courts will recognize and divide pension rights based on vesting that occurred while the military member was a domiciliary of another state. [FN28]

Without expressly overruling *Flowers*, several recent Mississippi cases have signaled a shift away from a title theory of property, used to support the determination that pension rights are personal to the person in whose name they are held, to a presumption in favor of equitable distribution of all assets acquired during the marriage, including pensions. [FN29] These cases do not rely on a legislative change in Mississippi law, and one of these cases, *Hemsley v. Hemsley*, is particularly noteworthy in that it involves division of military retired pay. A subsequent decision of the Mississippi Supreme Court in September 1994 confirms the court's position on equitable distribution, this time holding that postseparation adultery of a party does not bar equitable distribution. [FN30]

The decisions of the Mississippi Supreme Court in 1994 suggest that division of military pensions as marital property is now authorized under Mississippi law. Failure of the court to formally overrule prior decisions to the contrary, however, coupled with the strong voice of the court's dissent, and the as of yet silent voice of the state legislature, suggest that this is an issue worth watching. LEGAL ASSISTANCE attorneys should annotate their State-by-State Analysis of the Divisibility of Military Retired Pay accordingly. Major Block.

Footnotes

FN27. See LEGAL ASSISTANCE Items, State-by-State Analysis of the Divisibility of Military Retired Pay, ARMY LAW., July 1994, at 45.

FN28. 624 So. 2d 992 (Miss. 1993).

FN29. See *Hemsley v. Hemsley*, 639 So. 2d 909 (Miss. 1994); *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994).

FN30. *Carrow v. Carrow*, 20 Fam. Law. Rep. 1543 (BNA) (Miss. 1994).

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT
The Army Lawyer, August 1994

Although the Uniformed Services Former Spouses' Protection Act (USFSPA) [FN76] has been effective for over a decade, former spouses continue to inquire about their potential right to a share of retirement pay while retroactivity of state authority to divide military retirement pay as property has been a point of contention since passage of the USFSPA.

The USFSPA expressly envisions retroactive application of its terms at least as far back as the United States Supreme Court's *McCarty* decision, [FN77] which it overruled in part. [FN78] State court willingness to revisit the issue in cases that predated the *McCarty* decision led Congress to amend the USFSPA in 1990. [FN79] This amendment expressly prohibits courts from treating military retired pay as property in any case in which a preexisting final decree has been issued before 25 June 1981 without an express reservation of jurisdiction to divide. Authority to reopen decrees issued subsequent to 25 June 1981 is a question of state law.

Despite the seemingly clear language of the USFSPA amendment, state court rulings have not been entirely consistent. [FN80] While inconsistencies may be resolved on appeal, LAAs should ensure that the USFSPA amendment is the focus of discussion when counseling retirees and former spouses with decrees predating 25 June 1981. [FN81] Major Block.

Footnotes

FN76 10 U.S.C. s 1408 (1988).

FN77 In its decision issued 25 June 1981, the United States Supreme Court held that states had no authority to divide military retirement pay. *McCarty v. McCarty*, 453 U.S. 210 (1981).

FN78 Title 10 U.S.C. s 1408(c)(1) states, in part, that "a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981...."

FN79 *Id.*

FN80 Compare the Missouri Court of Appeals case in *Knox (Born) v. Born*, 20 Fam. Law Rept. 1338 (BNA May 1994), (finding amendment to be a bar to reopening a decree) with the New Mexico case of *Roybal v. Gonzalez* (discussed in *NAVY TIMES*, Dec. 6, 1993, at 24).

FN81 The potential to reopen decrees that were final after 25 January 1981 to address division of military retirement pay is a question of state law.

FORMER SPOUSES' PROTECTION ACT UPDATE
The Army Lawyer, July 1994

Although enacted in 1983, the Uniformed Services Former Spouses' Protection Act (USFSPA) [FN31] continues to be a critical subject of interest for many senior officers and noncommissioned officers, all of them potential LEGAL ASSISTANCE clients. Legal Assistance Attorneys (LAAs) must not only understand the basics of the USFSPA, but also should be aware of major issues related to its application.

One resource that all LAAs should have at hand is the recent message sent to the field by the Office of The Judge Advocate General (OTJAG). [FN32] This message emphasizes how state law can dramatically affect rights to military retirement benefits. For example, several states--such as, Mississippi, Indiana, Arkansas, and Tennessee--still condition division of pension benefits on "vesting." One of these states, Mississippi, recognizes no right to pension benefits that accrues to domiciliaries of Mississippi (although it will recognize pension benefits that have vested while a domiciliary of another state).

Another significant issue that the OTJAG message addresses is division of VSI and SSB benefits. While some courts have not been reluctant to divide these benefits, other states might condition division on when the benefit was received--that is, before or after the date of classification.

In addition to subjects addressed in the OTJAG message, LAAs need to recognize that interpretation and application of the USFSPA continues to evolve in litigation before state courts. For example, a recently reported Idaho case joins California and New Mexico courts in requiring retirement eligible service members to begin payment of the former spouse's share of retirement benefits, even though the service member has not yet retired. [FN33] A North Carolina court also recently examined the closely related question of pension valuation. [FN34] This court held that valuation must be determined as of the date of separation and be based on a present value of pension payments that the retiree would be entitled to receive if he or she retired on the date of marital separation, or when first eligible to retire, if later. Subsequent pay increases attributable to length of service or promotions are not included.

However questions related to pension valuation and division are resolved, LAAs need to recall that to be processed for direct payment, a final decree must state the former spouse's share in terms of a percentage or fixed amount of disposable retirement pay. If the service member is not yet retirement eligible, and this prevents the parties from determining the former spouse's share with specificity, the parties should take steps to ensure continuing jurisdiction to remedy this problem when retirement or retirement eligibility is reached.

The military pension is frequently not only the most significant asset our clients will have, but the most significant asset LAAs will work with. Advice and decisions regarding jurisdiction over this asset can, in some cases, mean a difference of hundreds of

thousands of dollars to a party. LEGAL ASSISTANCE attorneys must review the law of the client's domicile regarding military pension division, and be able to compare that law to any other state where a service member is considering a change in domicile or consent to jurisdiction. [FN35] LEGAL ASSISTANCE attorneys may want to keep the following state-by-state analysis of the divisibility of military retired pay handy for just this purpose. Major Block.

Footnotes

FN31. 10 U.S.C. § 1408 (1988).

FN32. Message, Office of The Judge Advocate General, Legal Assistance Division, subject: Division of Military Retirement Pensions (061400Z Jan 94). The point of contact for this message is Mrs. Patricia H. Laverdure, Army OTJAG Legal Assistance Division, DSN 227-3170, commercial (703) 697-3170. An in-depth analysis of many of the issues in this area is facilitated by use of the new Legal Automated Army-Wide System Separation Agreements Program now being fielded by the Army OTJAG.

FN33. See *Balderson v. Balderson*, 20 Fam. L. Rep. 1246 (BNA) (Idaho Ct. App. 1994) favorably citing several cases from both California and New Mexico.

FN34. *Bishop v. Bishop*, 20 Fam. L. Rep. 1221 (BNA) (N.C. Ct. App. 1994).

FN35. Jurisdiction to divide a military pension as marital property is limited by federal law to states where the service member is domiciled, living not as a result of assignment by military orders, or consents to jurisdiction. 10 U.S.C. s 1408(c) (1988).

**DRAFTING A SEPARATION AGREEMENT? DON'T
FORGET THE SURVIVOR BENEFIT PLAN!**

The Army Lawyer, December 1995

LEGAL ASSISTANCE attorneys have more to consider than just division of military retired pay when advising spouses seeking to divorce a service member. LEGAL ASSISTANCE attorneys must not forget about the Survivor Benefit Plan when drafting a separation agreement. Failure to do so will waive the former spouse's claim to benefits under the Survivor Benefit Plan.

Former spouses of service members must do two things to ensure that they are covered by the Survivor Benefit Plan. First, they must obtain a court order. [FN92] They can either enter into a written agreement with their service member former spouse agreeing that he or she must maintain coverage under the Survivor Benefit Plan and have that agreement incorporated or ratified by a court, or they can obtain a court order stating that the service member former spouse will provide coverage for them under the Survivor Benefit Plan. [FN93] Second, former spouses must send a copy of the court order to the Defense Finance and Accounting Service (DFAS) within one year of the date of the court order. [FN94] If a former spouse fails to ensure that both of these steps are taken, he or she runs the risk of not being covered by the Survivor Benefit Plan on the death of the service member former spouse.

The recent case of *Sumakeris v. United States* [FN95] illustrates this point. Mrs. Sumakeris was married to her service member husband when he retired, and he elected to cover her under the Survivor Benefit Plan. Mrs. Sumakeris and her service member husband divorced shortly thereafter. Despite being represented by legal counsel, the parties did not agree to provide Survivor Benefit Plan coverage for Mrs. Sumakeris, and her husband was not ordered to elect Survivor Benefit Plan coverage in her favor. Not surprisingly, neither she nor her attorney sent a copy of the divorce decree to the DFAS. Mr. Sumakeris canceled his participation in the Survivor Benefit Plan.

Because Mrs. Sumakeris did not obtain a court order and did not send a copy of it to DFAS within one year of the date of the court order, she was not entitled to coverage under the Survivor Benefit Plan. Even though Mrs. Sumakeris was never notified that her ex-husband had cancelled her coverage, the court held that she had waived her right to coverage under the Survivor Benefit Plan.

Legal Assistance Attorneys should ensure their clients understand the Survivor Benefit Plan and the need for former spouses to take affirmative steps to protect their Survivor Benefit Plan rights. To prevent waiver, Survivor Benefit Plan coverage must be provided for in a court ratified separation agreement or court order which must be filed with DFAS within one year of the date of the court order. Major Henderson.

Footnotes

FN92. 10 U.S.C. s 1450(f)(3)(A) (1988).

FN93. Id.

FN94. Id. s 1450(f)(3)(B).

FN95. 34 Fed. Cl. 246, 1995 WL 576775 (Fed. Cl. Sept. 28, 1995).

APPENDIX P

UNIFORMED SERVICES
FORMER SPOUSES'
PROTECTION ACT

Prepared By:
Army Recruitment Services
Deputy Chief of Staff
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Alexandria, VA 22331-0470

1 July 1995

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

Following is a general discussion of the legislative provisions of Public Law (PL) 97-252, September 8, 1982, the Uniformed Services Former Spouses' Protection Act (USFSPA) which is incorporated in Section 1408 of Title 10, U.S. Code. The points outlined are not designed to answer detailed questions concerning individual cases; rather, they serve as general information for use by retired members and their spouses and former spouses. This paper does not provide legal or judicial interpretation of enacted laws and does not deal with case law. Individuals seeking legal assistance are encouraged to contact a military lawyer or to retain civilian counsel. This paper is not a legal brief nor does it state a legal position. It cannot be used as evidence of intent, interpretation, or precedent in any legal action.

PL 97-252 has been amended by Public Laws 98-94, September 24, 1983; 98-525, September 27, 1984; 99-145, November 8, 1985; 99-661, November 14, 1986; 100-180, December 4, 1987; and 101-510, November 5, 1990. Further amendment is possible at any time.

DIVISION OF RETIRED PAY AS PROPERTY, ALIMONY, OR CHILD SUPPORT

Background. Prior to the 1981 McCarty vs. McCarty case, state courts disagreed on whether they were authorized or constrained by federal legal precedent in dividing military retired pay in divorce-related property settlements. On June 26, 1981, the U.S. Supreme Court ruled in the McCarty vs. McCarty case that military retired pay could not be treated as community property in divorce cases. In response, Congress enacted the Uniformed Services Former Spouses' Protection Act (USFSPA) which decreed that state courts could treat military retired pay as community property in divorce cases if they so chose.

The USFSPA allows the Defense Finance & Accounting Service - Cleveland Center (DFAS-CL) to make direct payment of state-court-ordered divisions of military retired pay as property to certain former spouses. Essentially, USFSPA allows direct payment to an ex-spouse where state law treats military retired pay as marital property in a divorce. The Act does not create a Federal right to any portion of the military retired pay on behalf of the former spouse, but rather recognizes that the states may treat it as such, and acts as an enforcement mechanism.

Disposable pay. One of the provisions of USFSPA is that direct payment may be made on disposable pay only. For court orders issued on or before November 14, 1986 (or amendments thereto), disposable retired pay does not include the retired pay (disability). Disposable pay is defined as retired pay to which a member is entitled less amounts which--

(1) Are owed by that member to the United States for previous overpayments of retired pay and for recoupment required by law resulting from entitlement to retired pay.

(2) Are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court martial or as a result of a waiver of retired pay required by law in order to receive compensation under Title 5 (civil service) or Title 38 (Dept. of Veterans Affairs (VA) compensation).

(3) In the case of a court order on or after November 14, 1986, the amount of the member's retired pay under Chapter 61, Title 10, USC, computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list).

(4) Are deducted because of an election under Chapter 73, Title 10, USC (Survivor Benefit Plan), to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order.

(5) If the court order was issued before February 3, 1991, are owed the United States.

(6) If the court order was issued before February 3, 1991, are withheld for federal and state income taxes to the extent that amount is consistent with the member's tax liability. This includes amounts for supplemental withholding under 26 USC 3402 (i) when the member presents satisfactory evidence of the tax liability (See 42 USC 659).

Direct payment to the former spouse. The law does not confer an entitlement to a portion of the retired pay as property, alimony, or child support, to a former spouse as a result of length of marriage or number of years overlap in the marriage and service. However, once a court has awarded a former spouse a portion of retired pay as property, alimony, or child

support, the former spouse may apply to DFAS-CL to receive that pay as a "direct payment." To qualify for a direct payment of "property", the law requires a former spouse to have been married to the member during at least 10 years of the member's service creditable for retired pay. There is no 10 year marriage requirement for payment of alimony or child support (See USC 1408).

The law further stipulates that DFAS-CL may not send more than 50 percent of a member's disposable retired pay as a direct payment unless there are additional garnishments for alimony or child support under Title 42, USC, Section 659. In those cases, up to 65 percent of the disposable pay may be sent as a direct payment.

Before passage of PL 101-510, some state courts amended pre-June 26, 1981, divorce settlements to provide for a division of retired pay as property. PL 101-510 stipulates that a court may not treat retired pay as property of the member and the spouse if the final decree of divorce, dissolution, annulment, or legal separation (including a court-ordered, ratified, or approved property settlement incident to such decree) (1) was issued before June 25, 1981, and (2) did not treat (or reserve jurisdiction to treat) any amount of retired pay as property of the member and spouse. Judgments issued before November 5, 1990, to amend pre-June 26, 1981, divorce settlements to provide for a division of retired pay as property, may be annulled or modified by this amendment on or after November 5, 1992.

When more than one former spouse has been awarded a division of a member's retired pay, payment will be handled on a first-come, first-served basis. When conflicting court orders exist, the law instructs DFAS-CL to send the amount specified in the lower of the two conflicting orders (not to exceed 50% of disposable pay), and retain the difference until the matter is resolved.

DFAS-CL must begin direct payment to the former spouse within 90 days of receipt of all required documents. If a member is not retired at the time of the court order, payments will begin after the required notification of the new retired member, but no later than 90 days after the member retires. USFSPA does not allow a state court to order a member to apply for retirement or to retire at a specified time in order to start payment.

Remarriage of a former spouse does not stop the direct payment of retired pay as property unless the court so orders. To apply for a direct payment contact:

Defense Finance and Accounting Service-
Cleveland Center, Code LF - Room 1417
Garnishment Operations Directorate
P.O. Box 998002
Cleveland, OH 44199-8002
Toll free, 1-800-321-1080 (8 a.m.-6 p.m. ET)

All correspondence between a former spouse and DFAS-CL must include the member's social security number.

Court orders sent to DFAS-CL must meet the following criteria:

(1) Be certified within 90 days immediately preceding its service on DFAS-CL.

(2) Have an original raised or multi-colored court seal. Photocopies of certified photocopies are not acceptable.

(3) If issued while the member was on active duty, and the member was not represented in court, show that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. APP., Section 501 et seq., were honored. A statement by the former spouse or his/her attorney is insufficient.

(4) Show that the former spouse and the member were married for at least 10 years, during which time the member performed at least 10 years of service creditable towards retirement. Otherwise, the former spouse must furnish evidence that such a requirement was met; for example, a copy of the marriage certificate.

(5) Appear that the court had jurisdiction over the member by reason of (1) the member's residence, other than because of military assignment, in the territorial jurisdiction of the court, or (2) the member's domicile in the territorial jurisdiction of the court, or (3) the member's consent to the jurisdiction of the court.

Requests for direct payment must be sent certified mail, return-receipt requested. Requests will not be accomplished until all required information is received by DFAS-CL.

Within 30 days of receiving all required information, DFAS-CL will contact the member with a notification which includes:

- (1) A copy of the court order and accompanying documentation.
- (2) An explanation of the limitations affecting direct payment to a former spouse from a member's retired pay.
- (3) A request that the member submit notification to the designated agent if the court order has been amended, superseded, or set aside. The member must provide an authenticated or certified copy of the operative court documents when there are conflicting court orders.
- (4) The amount or percentage of retirement pay that will be deducted if the member fails to respond to the notification.
- (5) The tentative effective date when direct payments to the former spouse will begin.
- (6) Notice to the member that failure to respond within 30 days of the date the notice was mailed may result in the division of retired pay as provided in the notification.
- (7) Notice that if the member submits information in response to the notification, the member thereby consents to the disclosure of such information to the former spouse or the former spouse's agent.

DFAS-CL shall not honor the court order if it is defective, modified, superseded, or set aside.

Payments to the former spouse shall begin within 90 days after DFAS-CL receives the completed paperwork. Payments shall conform with the normal pay and disbursement cycle of the member's retired pay. Payments that are a percentage of retired pay as property will change in direct proportion to and on the effective date of future cost-of-living adjustments to retired pay, unless the court order directs otherwise. Payments stop if

the member or former spouse dies, or as stated in the court order, whichever occurs first.

For court orders finalized on or after February 3, 1991, payment to a former spouse for division of retired pay as property is taxable. An IRS Form 1099R is sent to the former spouse.

When a member remains on active duty following divorce, the former spouse should send a copy of the divorce decree or property settlement to DFAS-CL. If SBP was awarded, this must be done within a year of the final decree or property settlement. See the SBP section below. If the court order meets the criteria of the law, it will be retained until the member retires. The former spouse must notify DFAS-CL of changes in address or marital status.

SURVIVOR BENEFIT PLAN (SBP) (10 U.S.C. §§ 1447 et seq.)

Voluntary vs. court-ordered. Until passage of the 1987 Defense Authorization Act, the USFSPA provided members the option of voluntarily electing SBP coverage for a former spouse as part of, or incident to, a divorce-related property settlement. State courts were not authorized to order an active duty or retired member to elect SBP coverage for a former spouse. Further, a retired member could not voluntarily elect coverage for a former spouse for whom spouse coverage had not been elected. The 1987 Defense Authorization Act permitted state courts for the first time to order a member to provide SBP coverage for a former spouse. This provision applies only to divorces finalized after 14 November 1986. As with voluntary elections, courts cannot order a retired member to provide this coverage unless the retired member had elected spouse coverage for that former spouse.

Remarriage. Former spouse SBP coverage is generally irrevocable. However, if the retired member remarries and wishes to cover the new spouse, a change in coverage may be requested within one year of the date of remarriage. Any such change requires the consent of the former spouse. Further, if the former spouse SBP coverage was ratified or approved by a court order, the court order must be amended before the year is up if a change in coverage is desired.

Similarity to spouse coverage. SBP coverage for a former spouse will be in the same amount as SBP coverage for the spouse. For former spouse elections made after March 1986, the cost, annuity, and remarriage provisions are exactly like those for spouse coverage. A former spouse who remarries before age 55 loses SBP eligibility; however, if the marriage ends in death, divorce, or annulment, eligibility is reinstated. A former spouse who remarries after age 55 does not lose eligibility (PL 99-661 changed the age from 60 to 55; this provision was not retroactive.)

Requesting a deemed election. If a member has voluntarily agreed to elect SBP coverage for a former spouse and that agreement has been ratified or approved by a court order, or, in divorces finalized after November 14, 1986, the member has been ordered to elect SBP coverage for a former spouse, the retired member must make that election within one year of the date of the divorce or dissolution. If the retired member fails to make the former spouse SBP election, the former spouse will not be covered **unless**, within a year of the final decree, the former spouse has requested in writing, from DFAS-CL, that a "deemed" SBP election be established for him or her. Therefore, **former spouses are encouraged to send the court order to DFAS-CL and request a deemed SBP election as soon after the court order is finalized as possible, even if the member is still on active duty.** That way, if the member fails to make the required election, the former spouse will have met the one year deadline to request the deemed election. If neither party requests former spouse SBP coverage within the prescribed timeframe, former spouse coverage will not be established. **KEEP COPIES OF WHAT IS SENT AND CERTIFIED MAIL RECEIPTS.**

IDENTIFICATION AND PRIVILEGE CARD (ID CARD) (DD FORM 1173)

Minimum eligibility requirements. The USFSPA and subsequent amendments authorize military benefits to certain former spouses. Benefits are authorized only if all three of the following criteria are met:

- (1) The marriage lasted at least 20 years, and
- (2) The member served at least 20 years service creditable for retired pay, and
- (3) The marriage overlapped the service creditable for retired pay by 15 or more years.

Benefits authorized. The number of years the marriage overlapped the service creditable for retired pay determines the extent of benefits authorized as shown below.

(1) **20/20/20 Rule:** If the marriage and service overlapped by at least 20 years, full privileges (commissary, exchange, theater, and medical care - military and CHAMPUS) are authorized.

(2) **20/20/15 Rule:** If the marriage and the service overlapped by at least 15 but fewer than 20 years, **medical care only** (military and CHAMPUS) is authorized for one year from the date of the divorce. At the end of that year, the former spouse has the option of enrolling in the Continued Health Care Benefit Program (CHCBP). See below for more information on CHCBP.

Restrictions. The following restrictions apply to medical benefits for either the 20-20-20 or 20-20-15 former spouse categories:

(1) Medical benefits (military and CHAMPUS) are not granted if the former spouse is covered by an employer-sponsored health care plan. However, the former spouse may cancel the employer-sponsored health care plan in order to become eligible.

(2) Medical benefits are terminated if the former spouse remarries. They are not reinstated if the remarriage ends in death or divorce. Commissary and exchange benefits are terminated if the former spouse remarries. They are reinstated if the remarriage ends in death or divorce.

(3) Normally, CHAMPUS benefits terminate when a former spouse becomes eligible for Part A of Social Security Medicare benefits. This normally occurs when the former spouse turns 65. However, in cases where the former spouse becomes disabled before 65 (except from end-stage kidney disease), qualifies for Part A Medicare, and is enrolled in Medicare Part B, CHAMPUS benefits do not terminate.

CONTINUED HEALTH CARE BENEFIT PROGRAM (CHCBP): Effective October 1, 1994, CHCBP replaced U.S. VIP as the health insurance program available to former spouses who lose entitlement to military health care. CHCBP is a **premium-based**, temporary transitional health care program that provides health care coverage via **standard CHAMPUS**. Application for CHCBP must be made within 60 days of loss of eligibility for military health care. Thereafter, it may be renewed every 90 days for at least a 36-month period. To find out if you qualify for a longer enrollment period, contact CHCBP. The address and phone number are listed below.

Other provisions of CHCBP include:

- The quarterly premium for a former spouse is \$410 in FY 95. This rate will increase annually on October 1st.
- Beneficiaries of CHCBP are subject to the same deductibles, co-payments, and catastrophic caps that apply to regular standard CHAMPUS beneficiaries.
- Pre-existing conditions are covered to the extent they would have been covered under standard CHAMPUS.

For more information on CHCBP contact:

Continuing Health Care Benefit Program
P.O. Box 1608
Rockville, MD 20849-1608
Toll-free, 1-800-809-6119

Application for former spouse ID card. To apply for a former spouse ID card:

(1) Complete DD Form 1172 (Application for Uniformed Services Identification & Privilege Card). DD 1172 is available from an ID card issuing facility of any branch or service.)

(2) Attach:

- (a) State-certified marriage certificate
- (b) Final divorce decree
- (c) If the member is retired, DD Forms 214 (Discharge from Military Service) covering the 20 years creditable service. (NOTE: Until a few years ago, enlisted personnel received a DD Form 214 each time they reenlisted.

Officers usually have only one unless they have prior enlisted service). A statement of service may be submitted in lieu of a complete set of DD Forms 214. A statement of service may be obtained as shown in paragraph 4 below.

(d) A statement certifying that the former spouse is not enrolled in an employer-sponsored health insurance plan.

(e) A statement certifying that the former spouse has not remarried. If the former spouse has remarried, but the remarriage has terminated, a copy of the termination document.

(3) A former spouse who has all the required documents may present everything to a local ID card issuing facility of the parent service for immediate issue of a card.

(4) The former spouse of a retired Army member should apply for a statement of service from: Commander, U.S. Army Reserve Personnel Center, ATTN: DARP-VSE-C, 9700 Page Boulevard, St. Louis, MO 63132-5200, telephone (314) 538-3570. The former spouse of an active duty Army member may apply for a statement of service from the member's military personnel office. If the ID card will be obtained from another service branch ID card issuing facility, a DD Form 1172 and other supporting documents should accompany the request. Ask that the application be verified so that it may be presented to another service branch ID card issuing facility who will issue the card.

(5) Always check on the current procedures by contacting an ID card issuing facility before attempting to obtain an ID card in person or by mail.

For additional information on the USFSPA, contact the nearest military legal assistance office.

Prepared by Army Retirement Services, Alexandria, Virginia 22331-0470.

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APPENDIX Q

TAKE-1

UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT (USFSPA)

1. Q. What is USFSPA?

- A. USFSPA is a law enacted by Congress to offer some financial protection to certain former spouses of servicemembers. It allows states to divide military retired pay as marital property upon divorce. It allows some former spouses (through a court order) to be awarded a share of military retired pay by direct payment from a military finance center and to obtain medical care and certain other benefits.

2. Q. What is retired pay?

- A. Retired pay is the total monthly pay to which a retired servicemember is entitled. It does not include disability pay, federal debt repayments, fines, forfeitures or Survivor Benefit Plan premiums.

3. Q. Can I get child support or alimony taken out of my spouse's retired pay and sent directly to me?

- A. Yes. In order to receive direct payment from a finance center for alimony and child support under the Act, you will first need to get a court order requiring the payment of child support or alimony. The court order does not have to state specifically that the award is made as direct payment of retired pay. The court order and/or other documents served with the court order must identify the soldier concerned and, if possible, state his or her Social Security Number.

4. Q. If part of the retired pay is awarded as marital property upon divorce, how do I obtain direct payment from the finance center?

- A. You must meet the "10-year test" to receive direct payment under the Act. You, the former spouse, must have been married to the servicemember for at least of 10 years, during which the member performed at least 10 years of creditable service for retirement purposes. Further, if you meet the test, you must get a court order specifically stating that the award shall be made as direct payment of retired pay.

5. Q. Do all states allow military retired pay to be divided as marital or community property?

- A. No. Most states have case law or legislation that allows the division of military pensions as marital property but a few do not. You should check the laws of the state where you presently live and the "home state" or domicile of the servicemember. You should also consult a military legal assistance attorney as to pension division in specific states.

6. Q. If state law allows the retired pay to be divided, how will the division take place?

- A. The rules for pension division vary from state to state. In North Carolina, for example, the court can divide the pension by ordering that a portion be paid to the non-service spouse upon the servicemember's retirement. This would be paid on a monthly basis as long as the retiree receives payments. The payments could come from the retiree or, if the "direct payment" conditions in #4 above are met, directly from the finance center so long as it is contained in a court order (not just in a separation agreement).

7. Q. Is there any way the court can divide the pension so I don't have to wait until my husband retires?

- A. Some states, such as California, allow payments to be made under court order while the member is still on active duty. North Carolina does not allow this. North Carolina law does, however, allow the present value of the pension to be used as a set-off or trade against other property that the non-service spouse will receive. Thus the retired pay might be traded against the marital residence if the values of each were roughly equal.

8. Q. How can I find out if my husband's pension is divisible in North Carolina?

- A. The answer to this questions depends on your husband's **legal residence** (or domicile) and his **length of service**. When a lawsuit for divorce and equitable distribution is filed here on or after August 1, 1983, the state of North Carolina has jurisdiction over the husband's pension if:

●He is a legal resident of this state; or

●He is residing in North Carolina for reasons other than because of military assignment; or

●He consents to the jurisdiction of North Carolina's courts over the division of his retired pay in an equitable distribution proceeding.

If none of the above conditions apply, then this state's courts cannot divide his retirement rights. If one of these conditions does apply, however, then we must inquire whether the pension is "vested" or not, since only vested pension rights are divisible marital property in this state. The expectation of nonvested pension rights in North Carolina still remains separate, not marital, property.

9. Q. When is a pension vested under North Carolina law?

- A. A pension is vested for an officer when he or she has served at least 18 years in the military as of the date of separation. North Carolina does not yet have any authoritative cases deciding when an enlisted person's pension becomes vested, but it probably is vested if the marital separation occurs when the servicemember is under an enlistment contract that will last into his twentieth year of creditable service.

10. Q. How much of the retired pay will be divided or awarded to me?

- A. The court can only divide "marital portion" of the pension, that is, the portion that was earned during the marriage (before the date of separation). The rest of the pension (that earned before marriage or after separation) is separate, nondivisible property. N.C. law presumes an equal division of all marital property, including retirement rights.

11. Q. If I die, what happens to the pension division award?

- A. Under USFSPA, your rights to a portion of military retired pay end upon your death. Payments cannot be made to your estate, survivors or heirs.

12. Q. Do I still continue to receive the benefits after the servicemember dies?

- A. It depends. Federal law states that, in the event the servicemember dies, the person receiving the award shall receive no further benefits unless the Survivor Benefit Plan (SBP) has been elected by the member. Payments will continue if SBP coverage has been chosen. The court can order a spouse to provide SBP coverage for the non-service spouse.

13. Q. Is there a maximum amount that I can receive under USFSPA?

A. Yes. USFSPA limits pension division awards to 50 percent of the net retired pay, regardless of whether the pay is awarded as child support, alimony, or marital property to be directly paid from the finance center. There are certain exceptions in the event of multiple court orders involving different spouses.

14. Q. What can I do if the soldier is required by court order to pay more than the maximum allowable amount under USFSPA?

A. If this happens, the finance center cannot help you. You will need to take action directly against the individual soldier through the courts for amounts in excess of 50 percent of the monthly retired pay.

15. Q. Besides retired pay, what other benefits can I receive under USFSPA?

A. If you are a former spouse and meet certain requirements, you may be able to receive full or partial medical, dental, commissary and post exchange benefits.

16. Q. How can I receive full benefits?

A. You can receive full benefits if you meet the "20/20/20 test". This three-part test requires that you must have been married to the soldier for at least 20 years. The soldier must have performed at least 20 years of creditable service toward retirement. Finally, at least 20 years of the marriage must overlap at least 20 years of active service. You must meet all three parts of the test.

17. Q. Does the date of the divorce decree matter if I meet the "20/20/20 test"?

A. No. If you meet the test, you are eligible to receive full benefits regardless of the date of the divorce decree.

18. Q. If I do not meet the "20/20/20 test" for full benefits, are there other benefits available?

A. Yes. You may be able to receive permanent medical benefits if the divorce decree was final before 1 April 1985 and you meet the "20/20/15 test".

19. Q. What are the criteria for the "20/20/15 test"?

A. You must have been married to the soldier for at least 20 years and the member must have performed at least 20 years of creditable service towards retirement. Finally, at least 15 years of the marriage must be during military of service. Again, as with the "20/20/20 test", you must meet all parts of the test.

20. Q. If I receive full benefits, can I be covered by other medical insurance?

A. Under either test, if you receive full benefits you cannot be covered by any type of employer-sponsored medical coverage. However, you can refuse your employer-sponsored medical benefits and retain the military medical benefits. You would also be disqualified if you have individually-obtained medical insurance.

21. Q. May I retain full benefits if I remarry?

A. No. You must remain unmarried under either test. Any subsequent remarriage eliminates the benefits, even if you are widowed or divorced later.

22. Q. If I meet the "20/20/15 test", but my divorce decree is final after 1 April 1985, am I still eligible for some benefits?

A. Yes. You are entitled to two years of transitional benefits, after which you have the right to convert to a private health plan set up by the Defense Department. However, you must remain unmarried and not be covered under employer-sponsored medical coverage.

23. Q. Are there any civilian agencies available to help me?

A. EXPOSE is an organization that has been lobbying Congress for increased military benefits for ex-military wives. EXPOSE can be reached at (703) 941-5844 or Post Office Box 11191, Alexandria, Virginia 22312. The American Retirees Association (ARA) is an organization that serves divorced military members--active-duty, Guard/Reserve and retired. The ARA can be reached at 2009 N. 14th Street, Suite 300, Arlington, Virginia 22201 ((703) 527-3065).

24. Q. If I have questions about my rights under USFSPA, what should I do?

A. Please consult a military legal assistance attorney or civilian lawyer of your choice as soon as possible. Your lawyer can answer the many questions that arise under USFSPA and help you to make a fair and intelligent decision about your options and alternatives. Our legal assistance office stands ready, willing and able to help you in these matters.

* * *

APPENDIX R

Uniformed Services Former Spouses' Protection Act

Provide general information on the Uniformed Services Former Spouses' Protection Act (USFSPA).

Facts:

- a. This is not a legal brief nor a position. It cannot be used as evidence of intent, interpretation, or precedent in any legal action. This paper is not a legal or judicial interpretation of enacted laws and does not deal with case law. Because of the complexity of the USFSPA, state divorce laws, and personal situations involved in a divorce process are encouraged to obtain legal counsel.
- b. Prior to the 1981 state courts disagreed on whether they were authorized or constrained by federal law in dividing military retired pay in divorce-related property settlements. On 26 June 1981, the U.S. Supreme Court ruled (McCarty vs. McCarty) that military retired pay could not be treated as community property in divorce cases.
- c. The USFSPA (Section 1408, Title 10 USC) established by PL 97-252 (8 September 1982) and amended by PL 98-94 (24 September, 1983); PL 98-525 (27 September 1984); PL 99-145 (8 November 1985); PL 99-661 (14 November 1986); PL 100-180 (4 December 1987); and PL 101-510 (5 November 1990) decrees that state divorce courts, if they chose, may treat military retired pay as community property. The USFSPA does not create a Federal right to any portion of the military retired pay on behalf of the former spouse, but rather recognizes that the states may treat it as such. The USFSPA does not allow the law to confer an entitlement to a portion of retired based solely on length of marriage.
- d. If a court awards a portion of retired pay as property, the former spouse may apply to the Defense Finance and Accounting Service-Cleveland Center (DFAS-CL), PO Box 99191, Cleveland, OH 44199-1126 to receive it as a "direct payment". To qualify for direct payment, the USFSPA requires that a former spouse must have been married to the member during at least 10 years of the member's service creditable for retired pay.
- e. Under the USFSPA no more than 50 percent of a member's disposable retired pay will be sent as a direct payment. However, if there are garnishments for alimony or child support, up to 65 percent may be sent as a direct payment.
- f. Depending upon date of court order, disposable pay is generally defined as retired pay to which a member is entitled less amounts:

- (1) owed to the United States for previous overpayments of retired pay and for recoupment required by law resulting from entitlement to retired pay.
 - (2) deducted from the retired pay as a result of forfeitures of retired pay ordered by a court martial or as a result of a waiver of retired pay required by law in order to receive compensation under Title 5 or Title 38.
 - (3) of the member's retired pay under Chapter 61, Title 10, USC, as computed using the percentage of the member's disability on the date when the member was temporarily or permanently retired, if the court order is dated on or after November 14, 1986.
 - (4) deducted because of an SBP election.
- g. PL 101-510 stipulates that a court may not treat retired pay as property if the final decree of divorce, dissolution, annulment, or legal separation (including a court-ordered, ratified, or approved property settlement incident to such decree) was (1) issued before 25 June 25 1981, and (2) did not treat (or reserve jurisdiction to treat) any amount of retired pay as property. Judgments issued before 5 November 1990, to amend pre-26 June 1981 divorce settlements, to provide for a division of retired pay as property, may be annulled or modified by PL 101-510 on or after 5 November 1992.
- h. When more than one former spouse has been awarded a division of a member's retired pay, payment will be handled on a first-come, first-served basis. When conflicting court orders exist, DFAS-CL will send the amount specified in the lower of the two conflicting orders (not to exceed 50% of disposable pay), and retain the difference until the matter is resolved.
- i. The USFSPA does not allow a state court to order a member to apply for or to specify a date of retirement.
- j. Unless court ordered, remarriage of a former spouse will not stop the direct payment of retired pay as property.
- k. For court orders finalized on or after February 3, 1991, payment of retired pay as property is taxable. DFAS-CL will send an IRS Form 1099R to the former spouse.
- l. If a member remains on active duty following divorce, the former spouse should send a copy of the divorce decree or property settlement to DFAS-CL. If SBP is awarded, DFAS-CL must be notified within one year of the final decree or property settlement date. If the court order meets the criteria of the law, it will be retained until the member retires. The former spouse must inform DFAS-CL of changes in address or marital status.
- m. Prior to PL 99-661 members could voluntarily elect SBP coverage for a former spouse under the Insurable Interest category.

- n. For divorces finalized on or after November 14, 1986, PL 99-661 permits state courts to order SBP coverage.
- o. If a member voluntarily elects SBP coverage for a former spouse and that agreement has been ratified or approved by a court order, or, if the member has been ordered to elect SBP coverage for a former spouse, the retired member must make that election within one year of the date of the divorce. A former spouse, within one year of the date of divorce may submit to DFAS-CL a request that a "deemed" SBP election be established. If neither the retiree nor the former spouse requests former spouse SBP coverage within one year of date of divorce, former spouse coverage will not be established.
- p. A retired member can not voluntarily elect nor can a court order former spouse SBP coverage if the retired member had not elected SBP spouse coverage at time of retirement.
- q. SBP coverage for a former spouse will be no more than the amount of SBP coverage for the spouse.
- r. A former spouse who remarries before age 55 loses SBP eligibility; however, if the marriage ends in death, divorce, or annulment, eligibility is reinstated. A former spouse who remarries after age 55 does not lose eligibility.
- s. Former spouse SBP coverage is generally irrevocable. However, if a retired member remarries a change from former spouse to spouse coverage, may be made with the former spouses written consent. Such a request for change must be submitted to DFAS-CL within one year of the date of remarriage. If the former spouse SBP coverage was ratified or approved by a court order, the court order must be amended within one year.
- t. Military ID cards cannot be ordered or decreed by a divorce court. Questions concerning eligibility should be directed to the nearest military ID card issuing facility. Generally former spouses are eligible if:
 - (1) The marriage lasted 20 years or more, and
 - (2) The member served 20 years or more of service creditable for retired pay, and
 - (3) The marriage and the creditable service overlap 20 or more years. (In some cases, restricted benefits are authorized if the overlap is less than 20 but greater than 15).
- u. For addition information on the USFSPA, contact the nearest military legal assistance office.

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APPENDIX S

EX - POSE

Ex-Partners Of Servicemen (Women) for Equality

P.O. Box 11191 Alexandria, Virginia 22312 (703) 941-5844

Your membership expired in April. As is our policy we do not remove names from the mailing list for a few months. But we regret to say that you will not receive the Jul/Aug newsletter unless you renew your membership. We hope you will remain on our referral list.

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